**IN THE MATTER OF THE HUMAN RIGHTS ACT 1981**

**IN THE MATTER OF THE BERMUDA HUMAN RIGHTS TRIBUNAL**

**BETWEEN:**

[redacted] L. Complainant

- v -

[redacted] F (1)
K (2)
Respondents

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**JUDGMENT**

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Mr Craig Rothwell of Cox Hallett Wilkinson Limited, for the Complainant.

Mr Dale Butler for the Respondents.

**Background**

1. The Complainant is currently employed as a Cashier at [redacted] Restaurant and commenced work there on 22 November 2010. Refers to F.

2. On the morning of 8 October 2013 the Complainant alleges that she was sexually harassed at Refers to K. [redacted] by [redacted] a waiter who was working with the Complainant at [redacted] that day. Specifically, as set out in the Particulars of Complaint dated 22 November 2013, [redacted] Refers to K. [redacted], inter alia, hit the Complainant three separate times on her behind. Refers to F.

3. The Complainant also alleged that her employer (then purported to be [redacted] Refers to F. Refers to F. [redacted] failed to take reasonable action to stop the sexual harassment from taking place, and further, on receipt of the complaint of sexual harassment, failed to address it properly, or at all.

4. The Complainant submitted that the conduct described in paragraphs 2 and 3 above was contrary to Sections 9(1), 9(3) and 9(4) of the Human Rights Act 1981 (**Act**).

5. The Respondents, inter alia, denied the actions of [redacted] constituted sexual harassment, Refers to K. Refers to F. denied that [redacted] failed to take reasonable action to stop the sexual harassment from taking place in the work place, and denied that they did not deal with the Complainant's concerns properly.

**Preliminary Issues**

6. Prior to the commencement of the hearing a preliminary issue was raised by Mr Rothwell as to who the correct Respondents should be (there being some confusion as to who was the correct employing entity of the Complainant).

7. Mr Rothwell submitted that the Complainant's statement of employment clearly identified Refers to F. [redacted] as the employer (rather than [redacted] which was, at that time, the named 1st Respondent). Mr Rothwell also sensibly suggested removing the Respondents [redacted] Refers to F. Refers to F. [redacted] (as they were simply managers of the employing entity).

Refers to F. 8. Mr Butler in turn submitted that despite [redacted] being listed as the employer on the statement of employment that was incorrect, the correct employing entity is in fact [redacted] Refers to F. Refers to F. [redacted]

9. Mr Rothwell had no reason to doubt the Respondents' position and accepted the submission that the correct entity should have been [redacted]. Refers to F.

10. No evidence was put before the Tribunal in respect of the corporate structure. As such, after considering the submissions from the parties, [redacted] Refers to F. [redacted] were removed as Respondents in this matter and [redacted] was substituted as Refers to F.

Refers to K. the 1st Respondent ([redacted] being the 2nd Respondent) on the basis that it is the correct employing entity of the Complainant.

11. A second preliminary issue arose as, due to personal medical issues, Mr Louis Somner (one of the original panel members of the Tribunal) could not attend the hearing. Mrs Donna Daniels kindly stood in for Mr Somner for the purposes of this hearing. This was accepted by the parties.

**Hearing**

12. On 19 June 2015 a full hearing of the evidence took place with the Complainant and Respondents being ably represented by Mr Rothwell and Mr Butler respectively.

Refers to K. and KS

13. The tribunal heard evidence from the Complainant, [redacted] (Assistant Manager of the 1st Respondent) and [redacted] (General Manager of the 1st Respondent). Refers to AD

14. For the purposes of the Tribunal's factual findings we focused on three distinct issues:

(1) What actually occurred between the Complainant and [redacted] on 8 October 2013 at [redacted] **(Incident);** Refers to K. Refers to F.

(2) What was the working environment at [redacted] at the time of the Incident (i.e. what attitude, policy and procedures did the 1st Respondent have in respect of preventing sexual harassment in the work place) **(Environment)**; and Refers to F.

(3) On receipt of the Complainant's complaint, how did the 1st Respondent react to, and deal with, her concerns **(Reaction).**

**Findings of Fact**

Refers to K. Refers to F.

15. By way of general background [redacted], for the most part, works at [redacted] which is a different venue to [redacted] where the Complainant works. However, it is the 1st Respondent's policy that [redacted] staff sometimes stand in for staff at [redacted], to Refers to F. Refers to F.

Refers to K. Refers to F.

cover sickness or holiday absences. As a result, on average, [redacted] works at [redacted] about once a month.

Refers to K. 16. [redacted]s was not the Complainant's line manager (though waiters were generally seen as more senior) and, prior to the 8 October 2013, both the Complainant and [redacted] Refers to K. described their relationship as a "working relationship". There were no previous issues or incidents of note between them.

Incident

17. After hearing the evidence of the Complainant and [redacted] the Tribunal makes the Refers to K. following findings of fact in respect of the Incident:

(1) Early on in their shift on 18 October 2013 [redacted] felt the Complaint was upset and/or gloomy. In order to cheer up the Complainant [redacted]s decided to "*joke around*". Refers to K.

(2) Initially, [redacted] briefly blocked the Complainant from getting to her counter. Refers to K.

(3) Minutes after blocking the Complainant from getting to the counter, [redacted] Refers to K. tapped the Complainant on the top of her head with his hand.

(4) Later on in the shift [redacted] flicked plastic bags at the Complainant, hitting the Refers to K. Complainant's behind three times in quick succession. We find that in between the second and third flick the Complainant shouted for him to stop, but the action had already started (i.e. we do not find that the third time [redacted] hit the Complaint he Refers to K. did so after clearly being told to stop).

Refers to K. 18. [redacted] denied in cross examination that he had blocked the Complaint and tapped her on the head (items 17(2) and 17(3) above). The Tribunal preferred the Complainant's evidence on these two issues. The Tribunal also found that the Complainant made it clear to [redacted]

Refers to K. [redacted] that she did not appreciate either of these two actions at the time and was not

Refers to K. engaging with [redacted]' behaviour.

Refers to K. 19. [redacted]s also denied that he hit the Complainant on the behind with the plastic bags; rather, he alleged that it was her lower back and side. On cross examination [redacted]s could not be absolutely sure exactly where he hit the Complainant, but it could possibly have been on her behind. The Tribunal preferred the Complainant's evidence on this issue, i.e. that [redacted]

Refers to K. [redacted] hit her on the behind three times with some plastic bags.

20. The Tribunal accepts the Complainant's evidence that she was upset and she felt her dignity

Refers to K. had been violated by the Incident. Further, that she subjectively felt [redacted]s actions constituted sexual harassment.

Refers to K. 21. The Tribunal accepts [redacted]' evidence that he subjectively had no sexual intent in his

Refers to K. behaviour during the Incident. [redacted]s categorised himself as a "*joker*" and genuinely believed that his conduct in the Incident was acceptable in the workplace. He went as far to state that he did it regularly in Europe before he came to Bermuda and did not know it would not be allowed in Bermuda.

Environment

22. The 1st Respondent has an Employee handbook (last updated in May 2012) (**Handbook**) which rightly sets out (in section 5) that sexual harassment in the workplace is prohibited. The definition of sexual harassment in the Handbook is:

*"Any verbal, written, visual or physical acts that are offensive in nature, intimidating, unwelcome or that could reasonably be taken as objectionable."*

23. On the evidence from the 1st Respondent's witnesses (and [redacted]s) employees are only Refers to K.
referred to the Handbook when they first arrive. Certainly [redacted]s could not remember Refers to K.
reading the Handbook save for when he first started working at the 1st Respondent 6 years ago. He also recalled a brief orientation meeting carried out by the Respondent on correct behaviour in the workplace at that time. Since then, he has not had any further training or reference to the Handbook.

24. The Tribunal found [redacted]s' evidence convincing that what he deemed as playful Refers to K.
behavior (such as throwing water and ice cubes, tapping people on the head and flicking

them with bags) is generally acceptable behavior in the 1st Respondent's business. [redacted]

Refers to K. [redacted] sincerely believed that his conduct during the Incident was acceptable, and he clearly is a popular member of staff and viewed affectionately by the 1st Respondent.

Refers to AD 25. [redacted] in his evidence, did not think the Incident was of any great concern. On cross

Refers to K. examination he was very clear that if [redacted] had touched the Complainant's behind with his hand then that would have potentially been sexual harassment, but this was not the case in this matter and, as he put it:

Refers to K. *"once [redacted] gave me his side of the story, that sorta like deflated the whole thing for me a little bit..... how can the flicking of a bag be a sexual harassment case"?*

Refers to KS 26. [redacted] evidence was also consistent with the Incident not being viewed as particularly

Refers to KS serious. [redacted] told the Complainant, when the matter was reported to her on the day in

Refers to K. question, that had she been flicked by [redacted] in this manner she would have just *"smacked [him] right back"* to resolve it.

27. The Tribunal finds that the working environment of the 1st Respondent facilitated [redacted]

Refers to K. [redacted] behaviour during the Incident.

Reaction

Refers to KS 28. Immediately after the Incident the Complainant reported the matter to [redacted], who did not consider it to be a formal complaint at that time. The Complainant then, in the evening,

Refers to AD telephoned the General Manager ([redacted]) when she got home and made a complaint over the telephone.

Refers to AD 29. The immediate reaction from [redacted] was that it was one person's word against the other so there was not much that could be done. He confirmed he would check the camera but did not do so until over a week later (and by then the footage was not retrievable).

30. On 9 October 2013, the day after the Incident, the Complainant made a formal complaint to

Refers to M. the Human Resources Manager, [redacted]. [redacted] was not produced as a witness by the 1st Respondent. The Complainant was ultimately told to put her complaint in writing, which she did on 18 October 2013.

31. According to Section 18(d) of the Handbook on receipt of a complaint in writing a Director of the Respondent will provide a written response within 5 working days.

32. In fact, the Complainant heard nothing further from the 1st Respondent, and [redacted] Refers to K. turned up for work at [redacted] on 22 November 2013. The 1st Respondent effectively ended any investigation into the Incident once the Complainant filed her written grievance. No formal interviews were ever conducted with [redacted] or the Complainant. Refers to K.

Refers to F.

33. The Tribunal is satisfied that once the Complainant made her formal written complaint that was, for all intents and purposes, the end of the matter for the 1st Respondent. The 1st Respondent did not treat the Complaint's complaint seriously, nor did it follow its own Handbook procedure.

34. It was somewhat puzzling to the Tribunal that, having accepted a formal complaint of sexual harassment had been made, no formal written statements were taken from [redacted] Refers to K. [redacted]) until the human rights complaint was actually filed. In any event, the Tribunal finds as a matter of fact that the 1st Respondent's general reaction to the Incident was that it was not serious, to the point they did not even complete their own internal processes and procedures (and still had not done so at the date of the hearing - almost 2 years after the Incident).

Refers to KS AD

**Legal findings**

35. The Tribunal appreciates that in the context of the sexual harassment cases the Incident is not on the serious end of the spectrum. However this clearly does not affect the test that should be applied in deciding whether there has been a breach of the Act.

36. It is prudent at this stage to set out the relevant sections of the Act:

*9(1) 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.*

*9(3) 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.*

*9(4) For the purposes of this section, a person harasses another sexually if he engages in sexual comment or sexual conduct towards that other which is vexatious and which he knows, or ought reasonably to know, is unwelcome.*

37. Whilst there is a plethora of case law in the United Kingdom, Canada and other common law jurisdictions on what constitutes sexual harassment there are few incidences of the Bermuda courts interpreting the Act in this regards.

38. In one of these cases, *Harris -v- Thorne & Rice*[1] the Tribunal notes that Justice Wade-Miller quite rightly mused that the definition of sexual harassment can be broad, imprecise and controversial based on each person's opinion of what it means. The Tribunal was particularly cognisant of Justice Wade-Miller's referral to Harvey and Industrial relations and Employment Law[2] which states:

    (a) *"A characteristic of harassment is that it undermines the victim's dignity at work and constitutes detriment on the grounds of sex; lack of intent is not a defence;*

    (b) *The words or conduct must be unwelcome to the victim and is for her to decide what is acceptable or offensive. The question is not what (objectively) the Tribunal would or would not find offensive;*

    (c) *The tribunal should not carve up a course of conduct into individual incidents and measure the detriment from each; once unwelcomed sexual interest has been displayed, the victim may be bothered by further incidents, which, in a different context, would appear unobjectionable; and*

    (d) *In deciding whether something is unwelcome there can be difficult factual questions for a Tribunal; some conduct (e.g. sexual touching) may be so clearly unwanted that the woman does not have to object to it expressly in advance. At*

[1] [2006] BDA LR 61
[2] paragraph 128pL68

*the other end of the scale is conduct, which normally a person would be unduly sensitive to object to, but because it is for the individual to set the parameters, the question becomes whether that individual has made it clear that she finds that conduct unacceptable. Provided that that objection would be clear to a reasonable person, any repetition would generally constitute harassment.*"

2nd Respondent

39. For convenience we will first deal with the liability of the 2nd Respondent, [redacted] Refers to K.

40. With the context of paragraph 38 above in mind, the Tribunal finds that [redacted], by Refers to K. standing in front of the Complainant and blocking her pathway, and shortly after, tapping her on the head, was guilty of minor unwelcome physical harassment. However, once this unwelcome conduct was directed to the Complaint's behind (by [redacted]s flicking her behind with plastic bags on three occasions) then the harassment became inherently of a sexual nature that undermined the Complainant's dignity at her workplace.

Refers to K. 41. [redacted] ought to have known, especially once the Complainant had rejected his apparent attempt to cheer her up (when he blocked her from getting to the counter, or when he tapped her on the head) that the flicking of her behind with a plastic bag was vexatious and would have been unwelcome by the Complainant. We therefore find this meets the test as set out in Section 9 (4) of the Act.

Refers to K. 42. Mr Butler submitted, that as [redacted]s was not in a position of authority over the Complainant, he could not be found liable for sexual harassment. The Tribunal (respectfully) thinks that what Mr Butler was getting at is the fact there is the possibility of tension between Section 9(3) and Section 9(1) of the Act in the circumstances in which the harasser is not in a position of authority. This is because it may be possible to read Section 9(1) as limiting the liability to an employee in a position of authority.

43. Mr Rothwell submitted that firstly, Section 9(3) has no reference to a position of authority but only refers to an act of sexual harassment by a fellow employee. If the purpose of the Act is to protect the right of freedom in the workplace from, inter alia, sex discrimination /

sexual harassment and the Act's aim is to identify and eliminate discrimination and remedy this, then, this should be the correct interpretation of Section 9(3).

44. Secondly, in interpreting Section 9(3) in this way, there is also no tension with the remainder of Section 9. It is not inconsistent with Section 9(1) that deals with the liability of a senior employee. It is not inconsistent with Section 9(2) that deals with the liability of a landlord, agent of landlord or fellow occupant of a building. It also dovetails with Section 9(4) that provides the definition of sexual harassment by "a person" and that person can be the employer, the agent of the employer or a fellow employee as expressed in Section 9(3).

45. Our finding is that upon reading Section 9(3) purposively and disjunctively, it is possible for liability to be found against any fellow employee of whatever level. The purpose of the Act is to prohibit sexual harassment. To suggest that the legislators only intended to protect an employee from harassment by those working at a more senior level is at odds with the intent of the Act.

46. Section 9(3) provides the protection (and right to bring a complaint against a fellow employee) and Section 9(1) adds to but does not limit or narrow this protection. Reading Section 9(1) and 9(3) side by side, without one limiting the other is the broad and correct interpretation to adopt. Section 9(1) makes it clear that in its most egregious form, sexual harassment by a person of authority is unlawful, with Section 9(3) broadening this protection further in accordance with the aims of the Act.

47. Mr Rothwell also submitted that, interestingly, the reference to "position of authority" in Section 9(1) is not replicated in any other Canadian or UK human rights legislation specifically relating to sexual harassment and employment. As such its reference appears to be outside the normative approach of other human rights legislation. It also is out of sync with the broad approach taken in Section 9(2) whereby in the area of landlord and tenant there is no "authority" restriction with the right to claim being present against landlord, agent of landlord and fellow occupant.

Refers to K. 48. In this particular case, [redacted]' evidence was that he saw nothing wrong with playfully flicking his female colleague on the behind. He stated that he acted in this type of manner

regularly in Europe and did not know it would not be allowed in Bermuda. He felt entitled to carrying out this type of Act towards his female colleague's body. The Tribunal is satisfied that this perceived entitlement derived from his position as a male. It was to correct this type of "mischief" that is one of the main purposes of the Act.

49. Mr Butler's passionate argument that for a Tribunal to make a finding of sexual harassment against [redacted] in this case would be "political correctness gone mad" is rejected by the Tribunal.

Refers to K.

50. In conclusion, in adopting a broad and purposive interpretation the Tribunal finds that [redacted] is directly liable under Section 9(3) of the Act.

Refers to K.

1st Respondent

51. This brings us to the 1st Respondent's liability in this matter.

Refers to K.

52. Quite clearly, from the evidence before the Tribunal [redacted]s had the implicit (and in some cases overt) support of his employer throughout this matter. It is therefore somewhat unfair on [redacted] to lay all the blame at his feet.

Refers to K.

53. The Tribunal find that whilst the 1st Respondent has the Handbook, there was no evidence of any formal training for any of the employees on its implementation. Given the First Respondent's position as an employer of many different nationalities in a busy and stressful work environment, the Tribunal finds it difficult to understand why no specific training was ever required of its employees, save for an initial orientation and the instruction to read the Handbook at the start of their employment.

54. Whilst the emotive submission of Mr Butler stressed that the 1st Respondent had a zero tolerance policy on sexual harassment and took such matters very seriously, this was not matched by its actions. The starkest example of this was their reaction to the Complainant's complaint. The delays and ultimate failure to follow its own policy on investigating the sexual harassment complaint is damning. Even if the 1st Respondent considered the complaint to be minor or a non-issue, the attitude displayed by the 1st Respondent in not

following its own procedures in dealing with such a complaint clearly indicates that it does not take the necessary steps to ensure that the workplace was free from sexual harassment.

55. Mr Rothwell submitted that if the Tribunal finds that an act of sexual harassment occurred as defined by Section 9(4) (which we have) and it finds that [redacted] did not take such action as was reasonably necessary to ensure that sexual harassment did not occur in the workplace under Section 9(3) (which we have), then there is no difficulty in finding [redacted] liable under Section 9(3). Further, the interpretation of an employer being responsible for an employee's actions is also wholly consistent with the case of *Robichaud v Canada (Treasury Board)*[3] (whose principles were approved by the Supreme Court of Bermuda in *Apex Construction Management Ltd. et al v Grant*[4] )

Refers to F.

Refers to F.

56. We agree with this position and find that the 1st Respondent is in breach of Section 9(3) of the Act.

**Damages**

57. The Tribunal accepts that the sexual harassment suffered by the Complainant could not be described as serious (certainly as the Complainant feels she can continue to work and still does work at the 1st Respondent).

58. Further, the only damages to consider in this matter (as submitted by Mr Rothwell) should be limited to injury to feelings.

59. In the Tribunal's view, the injury to the Complainant's feelings was heavily compounded by the 1st Respondent's work environment and its failure to adequately address the Complainant's complaint before returning [redacted]s (the person she accused of sexual harassment) to work alongside her on 22 November 2013 without notice.

Refers to K.

60. We agree with Mr Rothwell's sensible submission that this case would be best considered in the context of the awards set out in the case of *Vento -v- Chief Constable of West Yorkshire*

[3] [1987] 2 SCR 84
[4] [2015] SC (Bda) 24 App (6 April 2015)

*Police*[5] as updated in the *Bell -v- NSPCC*[6]. In particular, we accept that the injury to feelings sits in the lower bracket of the Vento Guidelines. This bracket says the following:

> "*Awards of between £500 and [£6,000] are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general awards of less than £500 are to be voided all together as they risk being regarded as so low and not be a proper recognition of injury to feelings.*"

61. Using the formula established in *Kelland v Lamer*[7] this gives the Vento banding a current range of $1000 - $12,000 Bermudian dollars.

62. Taking into account the circumstances of this case the Tribunal therefore makes an award of $4,000 for injury to feelings. $500.00 of this award is payable by the 2nd Respondent and the remaining $3,500 is payable by the 1st Respondent.

63. The reasons for this split of the award is due to the fact that the vast majority of the damage done in this case was due the 1st Respondent's failure to create an environment free from sexual harassment, and further, the 2nd Respondent's behaviour was with the implicit consent of his employer.

64. Finally, the Tribunal has considered Section 20 of the Act and notes that it has power to order any party who has contravened the Act do any act or thing that, in the opinion of the Tribunal, constitutes a full compliance of such provision. We do not think this extends to a Tribunal having the jurisdiction to order any specific action in this case. However, the Tribunal would make the following recommendations to the 1st Respondent to avoid such matters in future:

    (1) The Handbook should be reviewed on an annual basis;

    (2) Key workplace policies, such as sexual harassment in the workplace, should be posted and visible for all employees;

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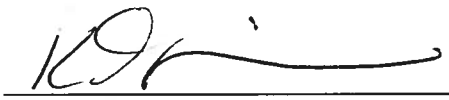
[5] [2002] EWCA Civ 1871
[6] [2010] IRLR 19
[7] [1988] Bda LR 69

(3) Employees should be provided training on the Handbook's implementation and correct conduct in the workplace on an annual basis; and

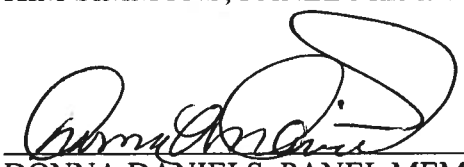
(4) The managers at the 1st Respondent should be provided training on how to deal with formal employee complaints once received, in particular, the importance of following their own processes and procedures in a correct and timely manner.

DATED this 21 day of October, 2015.

MICHAEL HANSON, CHAIRMAN



KIM SIMMONS, PANEL MEMBER



DONNA DANIELS, PANEL MEMBER