QUEEN'S BENCH FOR SASKATCHEWAN

Date: **2014 07 04**
Docket: Q.B.G. No. 1147 of 2013
Judicial Centre: Saskatoon

IN THE MATTER OF A COMPLAINT PURSUANT TO
THE SASKATCHEWAN HUMAN RIGHTS CODE, S.S. 1979, c. S-24.1

BETWEEN:

[redacted]

COMPLAINANT

- and -

EMPIRE INVESTMENTS CORPORATION and
JOHN PONTES

RESPONDENTS

Counsel:

Scott A. Newell — for the Saskatchewan Human Rights Commission
No one appearing — for the respondents

JUDGMENT
July 4, 2014

WILKINSON J.

---

[1] This human rights complaint is founded on allegations of sexual harassment in the workplace and constitutes one among a string of complaints brought against the respondent, John Pontes, and his corporate alter egos, for violation of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 (the "*Code*").

[2] The present complaint is brought under ss. 16 and 19 of the *Code*. The complainant, [redacted] asserts that John Pontes, owner-manager, and Empire

Investments Corporation, the respondents herein, engaged in gender-based discrimination in the form of sexual harassment during the course of her employment as a hotel clerk with "Northwoods Inn & Suites". This is the trade name under which Empire Investments Corporation operates.

[3] The complainant also alleges that she was subjected to improper requests for particulars of her ancestry and relationship status in the course of her job interview with Mr. Pontes.

[4] The *Code* provides as follows:

> 9 Every person and every class of persons shall enjoy the right to engage in and carry on any occupation, business or enterprise under the law without discrimination on the basis of a prohibited ground.
> ...
> 16(1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term of employment, on the basis of a prohibited ground.
> ...
> 19(1) No person shall ... make any written or oral inquiry or statement in connection with that employment that:
>
> > (a) expresses, either directly or indirectly, a limitation, specification or preference indicating discrimination or an intention to discriminate on the basis of a prohibited ground; or
> >
> > (b) contains a question or request for particulars with respect to a prohibited ground.

[5] The complainant must establish that it is more probable than not that the alleged discrimination occurred: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41. If the complainant's version of events is believed, this is sufficient (in the absence of any answer from the respondents) to justify a verdict in her favour.

[6] The onus shifts to the respondents under s. 39(2) of the *Code* to prove on a balance of probabilities that the discrimination was not contrary to the *Code*. The respondents are required to provide a rational explanation that is not discriminatory. As the respondents declined to engage in the hearing, no evidence was provided to the court within the contemplation of s. 39(2).

[7] The court is entitled to receive evidence regarding a pattern of practice in terms of prior discrimination by the respondents, and to rely on that evidence in reaching a decision: see s. 29.7(4) of the *Code* which states:

> 29.7(4) The court is entitled to receive and accept evidence led for the purpose of establishing a pattern or practice of resistance to or disregard or denial of any of the rights secured by this Act, and the court is entitled to place any reliance that it considers appropriate on the evidence and on any pattern or practice disclosed by the evidence in arriving at its decision.

[8] The test for the reception of "pattern of practice" evidence is whether it is (1) credible, cogent, and bears sufficient similarity to the evidence of the complainant, and (2) of sufficiently probative value to outweigh any prejudicial effect upon the respondents: *Howard Johnson Inn (operated by Empire Investments) v. Saskatchewan Human Rights Tribunal*, 2010 SKQB 333, [2010] S.J. No. 557 (QL).

[9] Sexual harassment in the workplace is broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment, endangers an individual's continued employment, negatively affects work performance, undermines personal dignity, or leads to adverse job-related consequences for the victims of the harassment: *Janzen v. Platy Enterprises Ltd*, [1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352. Sexual harassment may be blatant and overt, involving groping, fondling and other forms

of sexual assault, or it may be of a more insidious nature involving a campaign of sexual innuendo, propositioning, stalking, and the like.

[10] In determining whether the impugned conduct violates the *Code*, an objective test is applied: *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321; *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41, 267 D.L.R. (4th) 733. The essential question is whether a reasonable person would understand the conduct to be of an unwelcome sexual nature. As it is an objective test, proof of intent to discriminate is not necessary.

[11] In larger context, it has been observed that next to constitutional law, human rights provisions are more important than all other laws: *Cadillac Fairview Corp. Ltd. v. Saskatchewan (Human Rights Commission)*, [1999] 7 W.W.R. 517, 173 D.L.R. (4th) 609 (Sask. C.A.) at para. 29.

Procedural Background

[12] The complaint was laid on November 14, 2009.

[13] The respondents have been represented by experienced counsel throughout. The dates for the present hearing were selected many months ago, after a pre-trial management conference and with the full assent of the respondents and their legal counsel. Although counsel for the Commission was ready to proceed at an earlier date, the matter was scheduled for hearing in May 2014 to accommodate the respondents' preferences.

[14] Three weeks before the matter was to be heard, counsel for the respondents

withdrew, serving a notice of withdrawal on his clients.

[15] At the onset of the hearing, Mr. Pontes requested an adjournment but filed no supporting material as required by *The Queen's Bench Rules*.

[16] After questioning Mr. Pontes in this regard, I was of the view the respondents had not made meaningful or sincere efforts to find new legal representation. I rejected the explanation offered by Mr. Pontes that he only discovered the notice of withdrawal in his desk drawer a few days before the hearing was scheduled to proceed. Mr. Pontes advised the court that if given sufficient time, he had a lawyer from outside the province who might be prepared to act on the respondents' behalf. He could not offer any insight as to when this new lawyer might be available.

[17] Notwithstanding the inconvenience to witnesses, to counsel opposite, and to the court, I adjourned the proceedings another day to allow the respondents an opportunity to secure new representation. The matter can be fairly characterized as straightforward and uncomplicated. Mr. Pontes has represented himself in similar proceedings in the past. I did not see the need for a lengthy adjournment.

[18] On the second day of our allotted time, the respondents' former counsel also appeared at the court's request. At that time, he formally sought leave to withdraw, which was granted by the court. The reason for his withdrawal was non-payment of legal fees. Mr. Pontes advised the court that the out-of-province lawyer had been contacted, but had indicated he was not willing to act on the respondents' behalf. Mr. Pontes again requested an adjournment, which the court denied.

[19] I outlined to Mr. Pontes the nature of the case, the relevant provisions of

the *Code* and the procedures in terms of examining and cross-examining witnesses before the court.

[20] Mr. Pontes responded with a lengthy diatribe, encompassing the complainant, Commission counsel, Mr. Pontes' former counsel, the *Code*, the entirety of the Saskatchewan Bar, and the legal system in general, before taking his leave of the courtroom, never to return.

[21] The hearing thus proceeded in the absence of the respondents.

The evidence of the complainant

[22] [redacted] is a well-spoken individual, college-educated, with certification as a youth-care worker. She completed her practicum at [redacted] and was employed for a time with [redacted]. She has also held long-term employment in the food service industry in a supervisory capacity. Her work record was consistent and uninterrupted.

[23] In her late twenties she succumbed to drug and alcohol addiction, a decline she spoke of candidly and without attempts to minimize her responsibility or deflect blame. She acknowledged that her substance abuse issues had caused her son to be removed from her care. I found her to be a believable witness who gave her testimony without embellishment or artifice.

[24] From 2007 to 2009, [redacted] devoted her full time and effort to recovery, pursuing addiction treatment through the Calder Centre at the outset. She subsequently underwent in-patient treatment at facilities in Moose Jaw and Indian Head.

Afterward, she spent time in retreat at Cedar Lodge at Blackstrap Lake. After a long climb back to health, she felt capable of returning to work, and sought out employment opportunities.

[25] In April 2009, a male friend advised her he knew the owner of the Northwoods Inn & Suites in Saskatoon, and there were job openings there. She prepared a resume and applied for a position at the front desk. The owner of the hotel is Empire Investments Corporation, a company solely owned by John Pontes. [redacted] was interviewed by Mr. Pontes. Her male friend accompanied her to the interview. While she did not advise Mr. Pontes that she was a recovering addict, he did broach the issue of drinking, and the male friend indicated that [redacted] had just come out of treatment. At some point, Mr. Pontes asked the male friend to leave the room so that Mr. Pontes and [redacted] could speak alone.

[26] After the male friend departed, Mr. Pontes began making inquiries of a personal nature, the first being in relation to [redacted]'s religious affiliation and ethnic background. When she responded that she was German/Mennonite he commented upon her blonde hair and blue eyes and observed that the Mennonites were a hard-working people. He then asked whether she was in a relationship, and asked why a pretty girl like her would not have a boyfriend. [redacted] said she felt uneasy about the questions as she had never been interviewed in that fashion before. Nonetheless, she needed the work and accepted the position.

[27] She was hired as a front-desk clerk and told she could start the next day, being April 7, 2009. Her salary was $10 an hour plus commissions, with eligibility for raises if she did her work well. Her duties included checking guests into their hotel rooms, dealing with their accommodation needs, keeping the lobby area tidy and

organized, and tallying the receipts at the end of the day. Her immediate supervisor was an individual named Marie.

[28] Mr. Pontes maintains a residential suite at the hotel. He offered [redacted] the opportunity to rent a kitchen suite there, which she readily accepted. As it happened, her suite was located directly above Mr. Pontes' living quarters.

[29] The Northwoods Inn & Suites is not what one would describe as a "boutique hotel". As [redacted] described it, the facility is aging and out-dated. It is the accommodation of choice for transients and individuals struggling to get off social assistance. Mr. Pontes presides over his self-styled empire with a demeaning and abusive managerial style, subjecting his staff to frequent and prolonged tirades. [redacted] described these outbursts as similar to the one Mr. Pontes demonstrated in his appearance before this court.

[30] During her time on staff, the workforce was largely composed of recent immigrants and former welfare recipients. The composition was predominantly female. She testified that Mr. Pontes had a propensity for commenting on the appearance of female staff. He made a point of "flashing his money around". He often invited one or other of his female workers out for dinner. Whenever he handed out pay advances, he would say "you can pay me back" in a manner which [redacted] perceived as leering, and laden with sexual innuendo.

[31] [redacted] testified that very soon after she commenced employment she began to receive unwanted attentions from Mr. Pontes. He often told her she was beautiful and that she "looked like a movie star". On almost a daily basis, he would ask her to bring coffee to his office, and tell her to come round his desk so he could check out

her "tight ass". He took to inviting her out for dinner. He became more boorish as time progressed, inviting her to visit the back of his van, saying he wanted to rub her pussy the right way. He told her that although he was 66 years old, he could still give her the "best orgasm ever". At other times, he would ask her if she was a "trickster", which, in his own unique vernacular, constitutes his preferred term for "prostitute".

[32] [redacted] was working full time at the motel. At the same time, she was holding down part-time employment with a retail store. On one occasion when she complained to Mr. Pontes about the number of duties he expected her to fulfill, he responded that she was "stressed out and needed a good lay". She says she is a person who will speak her mind, whereas many of her co-workers were afraid to do so. On one occasion when Mr. Pontes was yelling at her, she told him she did not get paid enough to be yelled at like that. She complained about his conduct to her supervisor, Marie.

[33] She acknowledged that despite the sexually explicit invitations, Mr. Pontes made no direct physical contact, apart from the time two or three months into her employment when he gave her a raise and asked if he could hug her and kiss her on the cheek. She said "no", but he ignored her. She recalls that when he kissed her on the cheek and hugged her, she stiffened in shock and made a quick exit from the office.

[34] She began to feel increasingly anxious about being summoned to his office, where most of the lewd commentary occurred. In the presence of other staff, he would comment on her looks or appearance, but refrained from the kind of sexual innuendo he resorted to when they were alone.

[35] She began to worry he would try and come to her suite, given the proximity of their living quarters. In time, she came to dread the prospect of going to work.

Mr. Pontes' daily attentions, veering from unwanted sexual commentary to explosive confrontation, did much to erode the fragile veneer of self-confidence she had acquired during drug rehabilitation.

[36] Toward the end of her time at the hotel, employment that was just shy of three months, she felt increasingly unable to handle the daily stress of dealing with Mr. Pontes' relentless attentions. As she explains it, she felt emotionally drained and lacking in self-worth. She relapsed into drug use. She numbed herself with cocaine. Up to that point she had been drug and alcohol free for a year. Surrendering quickly to the pull of her addictions, she never returned to work. Accordingly, her term of employment ended on June 27, 2009.

[37] To her credit, she very quickly sought professional help again. As before, it was a long and protracted climb back to health. She contacted an addictions' worker and resumed another round of extended treatment through a succession of detoxification programs and therapy. These included intensive programs at Pine View Lodge in Moose Jaw, which she describes as "boot camp for addicts". Thereafter, she enlisted the aid of the Hope View program in the City of Battleford, designed to assist participants with successful reintegration in the community.

[38] While in treatment in Battleford, [redacted] received a telephone call from Mr. Pontes. He begged her to return to work at the hotel and help his business make money. He offered her the position of sales manager saying she could earn somewhere between $50,000 and $100,000 a year. The conversation turned personal. He asked if she had a boyfriend, and said her boyfriend should bring her naked to him. He said if she came back to work, he would "flourish her all in gold". She quickly ended the conversation at that point.

[39] Through ongoing counselling she dealt with her core issues, and her tendency to self-blame, but also came to the recognition that she did not have to accept denigrating conduct of the kind Mr. Pontes administered. New insights gained in treatment impelled her to take meaningful action. She launched her complaint against the respondents in November 2009, while still undergoing treatment. She resolved to bring Mr. Pontes to account for his actions, and has stood firm in bringing the complaint to culmination, some four and a half years later. From my limited experience with Mr. Pontes, I would venture to say it is not a process for the faint of heart.

[40] Upon completion of her treatment, [redacted] renewed her job search in May 2010. She feared returning home to Saskatoon in all the circumstances. Accordingly, her first round of job applications centred on postings in other localities outside Saskatoon. She was unsuccessful in her initial search. More than a dozen government postings were applied for, without response. In the fall of 2010, she returned to Saskatoon, moved in with her grandmother, applied for social assistance and eventually secured living accommodation on her own. She continued with her counselling throughout.

[41] In the spring of 2011, she began looking for work in Saskatoon. Applications were sent to Cameco, and others. Eventually, on June 1, 2011, almost two years after her departure from Northwoods Inn & Suites, she secured a position with a foundation engaged in health-care initiatives. She maintained employment there for three years, earning an annual salary of $30,000. Her position was eliminated shortly before this hearing, the result of Canada-wide restructuring. Two other Saskatoon staff positions were terminated at the same time as the complainant's.

[42] [redacted] specifically denied the allegations in the respondents' written

response to her complaint. The respondents asserted that she showed up for work smelling of alcohol, neglected her duties, and was engaged in prostitution and the sale of narcotics during the course of her employment. [redacted] indicated that she was participating in addiction counselling continuously during her tenure with Northwoods Inn & Suites and there were never any complaints about her work performance. She noted that she received a raise in recognition of her work, and believed she had performed her work diligently and to the best of her ability. She added that Mr. Pontes had pleaded with her to return to work during the lurid phone call he made to her while she was in treatment. The respondents' allegations are unfounded, and I accept the complainant's evidence at face value.

The evidence of Lewanna Dubray

[43] Ms. Dubray has been an investigator for the Saskatchewan Human Rights Commission for six years. She holds a Bachelor of Science degree in physical education, and a Bachelor of Laws degree. Her duties include providing information to parties, collecting statements from parties and witnesses, and preparing disclosure reports for the parties and the Chief Commissioner. She has been personally involved in a total of five investigations under the *Code* where the respondents, Mr. Pontes and Empire Investments Corporation, have been the subject of complaint.

[44] Through corporate registry searches, Ms. Dubray confirmed that John Pontes was the director, owner and operator of Empire Investments Corporation, carrying on business under the trade name of "Northwoods Inn & Suites".

[45] In the course of her duties she investigated the complainant's allegations in 2010. Ms. Dubray received a response from Mr. Pontes and Empire Investments

Corporation through the respondents' then counsel, Rose Noel.

[46] In Ms. Dubray's investigation, and in the course of her interview with Mr. Pontes, he confirmed that he was fully aware of [redacted] substance abuse issues at the time of her hiring, and that she had recently been involved in detoxification treatment. Ms. Dubray recorded this in her written report which was subsequently sent to Mr. Pontes for review and comment. While he refused to respond to her report, Mr. Pontes later reconfirmed, via his formal written response to the complaint (Exhibit P-3), that he was aware [redacted] had recently been in drug treatment when he hired her.

[47] Ms. Dubray offered "pattern of practice" evidence as follows:

1. She was the investigator assigned the [redacted] *v. Northwoods Inn & Suites* (2012), CHRR Doc. 12-3087 (S.H.R.T.) matter, a complaint against the same respondents originating at a similar time as the present one, and based on allegations of gender-based, and racial discrimination. The decision of the Human Rights Tribunal in the [redacted] matter was tendered as Exhibit P-5. [redacted] was an employee at the hotel when she was subjected to unwanted sexual invitations from Mr. Pontes. He told [redacted] he wanted to have anal sex with her and that his penis was 12 inches long. He indicated he could "break a table with it". He also said that her 13-year-old daughter, who was residing with [redacted] at the hotel, was "a child in a woman's body". He commented to his female employees that the hotel was not an "open door society", and all they were good for was being on their backs. The Tribunal also found the evidence of [redacted] and other witnesses at the hearing established a pattern of practice employed by Mr.

Pontes that was characterized by name-calling, yelling and sexual harassment, and that the workplace was one where women were targets and subjected to ongoing sexual harassment. The Tribunal referred to four prior *Code* violations by Mr. Pontes and/or his corporate holdings where discriminatory conduct was well documented, including: [redacted] *and RWDSU, Local 558 v. Empire Investments Corporation, Howard Johnson Inn Saskatoon and Northwood Inn and Suites* (December 6, 2007- Arbitrator Chad Smith); *C.L. v. Howard Johnson Inn* (2009), CHRR Doc. 09-2303 (S.H.R.T., Lepage), upheld in *Howard Johnson Inn (operated by Empire Investments) v. Saskatchewan Human Rights Tribunal, supra*; [redacted] *v. Howard Johnson Inn* (2009), 67 CHRR D/69 (S.H.R.T., Worme), upheld on appeal *Howard Johnson Inn (c.o.b. Empire Investments Corp.) v. Saskatchewan Human Rights Tribunal*, 2010 SKQB 81, 354 Sask.R. 207, and *Howard Johnson Inn (operated by Empire Investments) v. Saskatchewan Human Rights Tribunal*, 2011 SKCA 110, 375 Sask.R. 288; [redacted] *and RWDSU, Local 558 v. Empire Investments Corporation and Northwoods Inn & Suites* (June 30, 2011, Arbitrator Stevenson). The Tribunal thus awarded $5,000 in damages to [redacted] under s. 31.4(a) of the *Code* in compensation for the respondents' wilful and reckless contraventions. In addition, a "cease and desist" order was imposed and an anti-discrimination policy was ordered to be posted at Northwoods Inn & Suites.

2. Ms. Dubray was also tasked with investigating the complaint made by [redacted], age 19 (the aforementioned complainant in *C.L. v. Howard Johnson Inn*). There, the complainant established that in the course of a job interview, Mr. Pontes made comments of a sexual nature

(telling her she had nice eyes, was really pretty, and had a sexy body). He inquired how old she was, and indicated she was "old enough to know what to do". He asked her on a date, rubbed her hand, and gave her his phone number. The Tribunal found that Mr. Pontes did make sexual comments and touched the complainant's hand in the course of a job interview. It awarded the complainant $2,000 in damages for compensation for injury to feelings, dignity and self-respect and $1,000 in costs.

3. Although not directly involved in the investigation, Ms. Dubray also referred to the [redacted] matter, (referred to in [redacted], *supra*), where the Tribunal accepted unchallenged evidence that Mr. Pontes regularly abused patrons and employees who were of aboriginal ancestry, and awarded the complainant $7,000 in damages.

Discussion

[48] I have accepted the evidence of [redacted] and Lewanna Dubray as credible and cogent testimony. It is persuasive, particularly in the details that capture Mr. Pontes' florid pattern of speech. It is unchallenged by other evidence. The "pattern of practice" evidence, as drawn from [redacted] and [redacted], meets the legal threshold for reception, being cogent, sufficiently similar, and more probative than prejudicial. Section 29.7(4) of the *Code* permits the court to place "any reliance that it considers appropriate on the evidence" in arriving at its decision. What, then, is "appropriate reliance" in the circumstances?

[49] In the broader legal context, propensity evidence or similar fact evidence is carefully circumscribed due its prejudicial effect. Similar fact evidence, being evidence which is adduced solely to show that the accused is the sort of person likely to have

misbehaved or offended, is as a rule, presumptively inadmissible. In all cases where similar fact evidence is tendered, its admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused by its admission: see *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908.

[50] In contrast, under the *Code*, the situation is the reverse. "Pattern of practice" evidence is presumptively admissible. It is left to the court to decide what use to make of the evidence. The more focussed and specific the evidence is in relation to the complaint, the more cogent its probative value. Accordingly, depending on its weight and significance, "pattern of practice" evidence might conceivably be the preponderant evidence in establishing a violation of the *Code*. In other cases, it might provide needed corroboration in terms of giving credence to the complaint and buttressing a witness's credibility – for example, in circumstances involving a potentially unreliable witness, or one who stands to receive material advantage from court testimony. Corroborative evidence is simply that which is capable of restoring the trier's faith in the witness's testimony: *R. v. Kehler*, 2004 SCC 11, [2004] 1 S.C.R. 328, at paras. 12-13.

[51] In this case, I have found the complainant to be sincere, credible and trustworthy in terms of her testimony. Given the evidentiary burdens as earlier outlined – a *prima facie* case, and a shifting onus - the complainant is entitled to a finding in her favour, in the absence of an answer from the respondents. I found it unnecessary to resort to the "pattern of practice" evidence in terms of finding liability.

[52] However, pattern of practice evidence may also have bearing on the question whether to award additional compensation under s. 31.4 of the *Code* as it is material to finding whether a respondent has wilfully and recklessly contravened the *Code*. It may impact on the determination of costs under s. 29.8 of the *Code*, which are

only be awarded where there has been vexatious, frivolous or abusive conduct on a litigant's part. This will be addressed below.

Remedies

[53] The Commission seeks the following compensation on behalf of [redacted] as against the respondents, jointly and severally:

1. Under s. 31.4 of the *Code*, $10,000 for wilful and reckless violations, or injury to the complainant's feelings, dignity and self-respect;

2. Under s. 40 of the *Code*, lost earnings from June 27, 2009 to June 1, 2011;

3. Costs pursuant to s. 29.8 of the *Code*.

[54] The monetary remedies the court is able to award for *Code* contraventions include compensation for lost wages and benefits, special expenses, and compensation up to $10,000 for wilful and reckless violations, or injury to dignity. These are outlined in the following sections:

> **Orders by court**
> 31.3(1) If the court finds that there has been a contravention of any provision of this Act, or any other Act administered by the commission, the court may, subject to section 31.5, order any person to do any act or thing that in the opinion of the court constitutes full compliance with that provision and to rectify any injury caused to any person and to make compensation for that injury, including:
>
> ...
>
> (c) requiring that person to compensate any person injured by that contravention for any or all of the wages and other benefits of which the injured person was deprived and any expenses incurred by the injured person as a result of the contravention;

...

Order respecting compensation

31.4 The court may, in addition to any other order the court may make pursuant to section 31.3, order the person who has contravened or is contravening that provision to pay any compensation to the person injured by that contravention that the court may determine, to a maximum of $10,000, if the court finds that:

> (a) a person has wilfully and recklessly contravened or is wilfully and recklessly contravening any provision of this Act or any other Act administered by the commission; or
>
> (b) the person injured by a contravention of any provision of this Act or any other Act administered by the commission has suffered with respect to feeling, dignity or self-respect as a result of the contravention.

...

Court may order compensation to and reinstatement of an employee

40 Where an employer is convicted for violation of section 16 or of having suspended, transferred, laid off or discharged an employee contrary to this Act, the convicting court may, in addition to any other penalty, order the employer to pay to the employee compensation for loss of employment in an amount not exceeding an amount that, in the opinion of the court, is equivalent to the wages, salary or remuneration that would have accrued to the employee up to the date of conviction but for the suspension, transfer, layoff or discharge, and may order the employer to reinstate the employee in his or her employ, at any date that, in the opinion of the court, is just and proper in the circumstances, in the position the employee would have held but for the suspension, transfer, layoff or discharge.

Compensation under s. 31.4 of the Code

[55] To the extent a person can be considered a "repeat offender", this necessarily impacts upon the determination whether there has been wilful and reckless contravention of the *Code* for the purposes of s. 31.4. Mr. Pontes' corporate entities were found to be in violation of the *Code*, for employment discrimination based on sex as early as December 6, 2007 ([redacted] *and RWDSU, Local 558 v. Empire Investments Corporation, supra*). He has been previously ordered to cease and desist. He has

previously been sanctioned in costs for unreasonable and vexatious behaviour. He has, in past proceedings, been ordered to post anti-discrimination policies at Northwoods Inn & Suites. Mr. Pontes can be presumed to possess full knowledge of that which constitutes unacceptable conduct under the *Code*.

[56] Counsel for the Commission suggests that in light of the respondents' past history of violations and sanctions, the court should make a compensation award of $10,000, the maximum amount permitted under s. 31.4 of the *Code*. Counsel notes that the maximum amount allowed falls substantially below the damage awards available in other jurisdictions.

[57] I find that in the dealings with [redacted] the contraventions were both wilful and reckless. The entire course of his dealings with [redacted] demonstrates a callous indifference to the particular vulnerabilities of a recovering addict, a frailty that Mr. Pontes was clearly alive to when he hired the complainant.

[58] In *ADGA Group Consultants Inc. v. Lane* (2008), 91 O.R. (3d) 649, 295 D.L.R. (4th) 425 (Ont. Sup. Ct.), the court heard an appeal from an award made by a Human Rights Tribunal in Ontario where there is similarly a $10,000 maximum for "reckless infringement" of human rights, but no ceiling on general damages awards.

[59] The court held that, in matters relating to human rights violations, care should be taken to ensure that compensation awards are not set too low, since doing so would trivialize the social importance of the *Code* and effectively create a "licence fee" to discriminate. A violation is a severe blow, especially to those in supervisory positions which require greater self-confidence than expected of a regular employer. Injury to a person's feelings and dignity, the discouragement and loss of self-confidence that result,

leave those individuals with the hopeless conclusion that their impediment is beyond their power to change. The court said this is not to be lightly assuaged.

[60] The *ADGA* decision dealt with a human rights complaint involving discrimination on the basis of failure to accommodate an employee's disability, being a bipolar disorder. Like the present case, it involved what is known as a "thin-skulled" complainant. Following his termination, the employee had a manic episode, and fell into severe depression. He was unable to find employment for several years afterwards. In that case, the Tribunal had awarded the complainant general damages of $35,000 for violation of his inherent right to be free from discrimination, $10,000 for the reckless infliction of mental anguish, and $34,279 for loss of salary resulting from the violation of his rights The court agreed that the precipitate and dismissive attitude the employer exhibited towards the complainant justified a finding of recklessness and supported an award of damages in the amount of $10,000 (over and above the award for general damages). The court confirmed that the finding of recklessness was reasonable, as was the $10,000 quantum of that award.

[61] I am satisfied that an award of $10,000, the maximum allowed under s. 31.4 of the *Code* for wilful and reckless violation or loss of dignity, is appropriate in this case, given the elements of wilful and reckless conduct inherent in the violations that occurred.

Loss of earnings: s. 31.3(1)(c) of the Code

[62] The conduct of Mr. Pontes prompted the complainant's relapse into addiction. As held in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, parties must assume full responsibility for loss caused or materially contributed to by their actions. It matters not that the complainant, by virtue of being a recovering addict, may

have relapsed in any event at some future time, or that she suffered more acute or prolonged setbacks than a person of ordinary fortitude or resiliency might have done.

[63] The respondents must take the complainant as they found her — the so-called "thin skull rule".

[64] However, I am not satisfied that the complainant is entitled to lost earnings in the full amount claimed. During her participation in treatment programs her basic needs for housing and food and other necessities were being met in some fashion. After completing treatment, and after the job search proved unsuccessful, the complainant received social assistance benefits in the fall of 2010 until she found employment on June 1, 2011.

[65] Social assistance benefits are a form of wage replacement. They are intended to replace that part of employment income that would normally be spent on meeting basic needs. Therefore they should be deducted from an award for past loss of earnings as to do otherwise would amount to double recovery. Three Supreme Court of Canada decisions have addressed this question: *M.B. v. British Columbia*, 2003 SCC 53, [2003] 2 S.C.R. 477; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 at paras. 145-147; and *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205. In these decisions, the Supreme Court of Canada accepted that the general principle of deductibility was becoming increasingly entrenched in Canadian courts. See also *Brown v. Campbell*, 2011 ONSC 4984, 109 O.R. (3d) 306.

[66] Further, she adjudged herself capable of returning to work in May 2010. That she was unable to find work until June 1, 2011, may have been a reflection of the market, or that she was not well-qualified for the work she sought to obtain. I was not

given any particulars of the job postings, other than that they were initially "government positions" and, later, applications to Cameco and the like. I recognize, however, that any job search ordinarily requires some time to implement.

[67] The evidence is far from complete in terms of benefits received during her treatment program and other social assistance benefits. Any income she would ordinarily have earned would necessarily have gone, in part, toward housing and other basic necessities, yet these were effectively covered during her time in treatment. In October 2010, she applied for social assistance in Saskatoon and received benefits until she found work on June 1, 2011. To award the full amount of lost earnings would give the complainant the kind of double recovery decried in the decisions of the Supreme Court of Canada.

[68] Under *The Saskatchewan Assistance Act*, R.S.S. 1978, c. S-8, and regulations in effect at the material time (*The Saskatchewan Assistance Regulations*, Sask Reg 78/66, s. 25, C(4)(iii) and (6)), it is clear that a recipient who resides in an alcohol and drug treatment centre receives basic allowances in an amount not more than the actual cost of residing in a treatment facility as well as a basic living allowance.

[69] I conclude that fair compensation for the complainant can be achieved by awarding lost earnings for a 15-month period, (July 2009 to September 2010) less an amount reflecting the benefits received by having her living expenses covered while in treatment for a period of 11 months during that period. The complainant was earning $660 a week in her employment. I consider a reasonable value to place on her benefits as being $1,000 a month. Consequently, I award loss of earnings in the amount of $42,900 less $11,000 for a net award of $31,900.

Costs

[70] The provision with respect to costs of the proceedings is set out below:

> **Costs**
> 29.8 Neither the court nor the Court of Appeal may award costs to any party unless the court or the Court of Appeal considers that there has been vexatious, frivolous or abusive conduct on the part of any party.

[71] The Commission says that Mr. Pontes and the corporate respondent have repeatedly and intentionally violated the *Code*. He has made it clear he has no respect for the process. He has been the subject of previous cost awards in *C.L. v. Howard Johnson Inn, supra*, and in the [redacted] matter.

[72] Until shortly before the hearing date, the respondents were represented by counsel and matters progressed in the ordinary course. I do not attribute any vexatious, frivolous or abusive conduct to the respondents in relation to the pre-hearing process. The hearing itself was another matter. Mr. Pontes appeared unprepared to proceed, despite being given a day's grace to obtain new counsel. His conduct before the court was rude and obstructive. Some costs are appropriate given the delay occasioned by his default. I award costs of $3,000.

Public Interest Order

[73] The Commission requests an order that the respondents comply with and enforce the sexual harassment policy appearing at Schedule "A" to the award in [redacted], *supra*. That order is granted.

Summary

[74] The complainant will have judgment against the respondents, jointly and severally, in the following amounts:

1. $10,000 as compensation for the respondents' wilful and reckless violation of the *Code*.
2. $31,900 for loss of earnings.
3. $3,000 in costs, payable to the Commission.

[75] In addition, there will be an order that the respondents comply with and enforce the sexual harassment policy appearing at Schedule "A" to the award in [redacted], *supra*.

[76] There will be an ordering waiving compliance with Rule 10-4 of *The Queen's Bench Rules*.

J.
Y.G.K. WILKINSON