HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: A Complaint by JASON WALMSLEY against BROUSSEAU BROS. LTD. operating as SUPER LUBE alleging a breach of Section 19 of *The Human Rights Code*;

AND IN THE MATTER OF: *The Human Rights Code*, C.C.S.M., Chapter H175, as amended.

BETWEEN

JASON WALMSLEY,

Complainant,

- and -

BROUSSEAU BROS. LTD.
operating as SUPER LUBE,
and SUPER LUBE LTD.

Respondent.

Dates of Hearing: **April 21 – 24, 2014**
May 1, 2014

Decision **June 11, 2014**

Overview

[1] The Complainant, a former employee of the Respondent companies, complains that his former employer knowingly permitted, or failed to take reasonable steps to terminate, the sexual harassment he alleges he suffered at the hands of Ms. Heather Kirton, an individual he described as his manager. The fundamental question that this

tribunal must answer is whether or not on a balance of probabilities, *The Human Rights Code* has been breached directly or indirectly in the manner alleged in the Complaint.

[2] I gave all parties at the hearing significant latitude to present their cases. I did so in light of the Code, which permits a more informal approach and because the Complainant and Respondents were self-represented. For the latter reason I have also reviewed the evidence extensively in these Reasons.

[3] As the hearing proceeded, it became clear that significant aspects of the allegations contained in both the Complaint and the Response were either not proven, were acknowledged not to have been truthful, or amounted to nothing more than sophistry. Further, the evidence of certain key witnesses was often inconsistent and frequently unreliable. Credibility and reliability (or perhaps the incredibility) of various key witnesses became significant factors in determining this matter.

[4] As shall be more fully set out below, it was abundantly clear at the hearing that what was going on at the Respondents' shop/garage on Regent Avenue in Winnipeg was highly inappropriate. It was uncontroverted that there was sexual activity and illegal drug use occurring there both during and after work hours. The illegal drugs used at the shop/garage included both crack cocaine and marijuana.

[5] That said, it is not the role of the adjudicator in these proceedings to redress inappropriate behavior, save and except to the extent that such inappropriate behavior crosses the line and contravenes *The Human Rights Code*. Once that line has been crossed however, the Code requires that appropriate remedies be instituted.

[6] In this case, I have found that significant portions of the Complaint have not been proven on a balance of probabilities. Still, for the reasons that follow, I have been persuaded that in respect of two allegations, the Code was breached and that making certain remedial orders would be just and appropriate in all of the circumstances.

[7] Prior to reviewing the evidence and addressing the fundamental issues, several preliminary issues raised by the parties at the hearing need to be addressed.

Preliminary Issues

[8] Two preliminary issues arose at the commencement of the hearing. Counsel for the Commission sought to add another named corporate defendant. This request was not contested and was granted.

[9] In addition, the Respondents sought to dismiss the Complaint on a summary basis, essentially due to delay. Analysis of these latter issues requires a brief review of some background.

[10] On February 13, 2014 at 2:00 p.m., a pre-hearing teleconference was held involving counsel for the Commission and the Respondents. Although counsel for the Commission assured me that the Complainant was advised of the date, given his incarceration, he did not attend. The purpose of the hearing was to discuss process and procedure and to ensure that the matter was ready for timely adjudication.

[11] At the pre-hearing conference, the parties confirmed that there were no contemplated or outstanding preliminary matters or Motions. They confirmed that 3.5 days would be required for the hearing (which proved to be under-estimated by

approximately 1.5 days) and set out their position that no one should be added as a party.

[12] The latter issue was canvassed for a second time at the hearing at my request in terms of adding Ms. Kirton as a party. Given the unanimous submissions of all of the parties not to include her and concerns I had about fairness to Ms. Kirton if she was added as a party in the midst of the hearing, she was not added as a party.

[13] At the pre-hearing conference, both counsel for the Commission and the Respondents helpfully indicated the number of witnesses they might call and identified those potential witnesses. They also provided a general overview of the reason that they might call those particular witnesses. Both the Respondents and counsel for the Commission were advised that the fact that they provided the names of potential witnesses, did not mean that they were required to call all of the witnesses listed.

[14] Counsel for the Commission indicated that they might call three witnesses, being the Complainant, his mother, and a possible third party. At the time, the Commission did not know the identity of the third party. The Commission subsequently wrote to the adjudicator, appropriately copying the Respondents, indicating that they intended to call the Complainant's father as a witness as well. In fact, the Commission called three witnesses, being the Complainant, his mother, and his father.

[15] For its part, the Respondents indicated that they might call five witnesses, being: Shaun Swetz (now known as Shaun-Kyle Hoebbe), Sean Curtis, Al Cousins, John Leullier, and Ms. Heather Kirton. The Respondents called all of the aforementioned

witnesses, save and except for Al Cousins. No explanation was provided as to why Mr. Cousins was not called, despite the role he played in dealing with the matters in issue.

The Respondents' Request to Dismiss

[16] The Respondents' oral request to dismiss the entirety of the Complaint due to the length of time it took to bring the Complaint before the adjudicator was a matter first raised by the Respondents at the hearing. No advance notice or service was provided to counsel for the Commission, the Complainant, or the adjudicator of the request.

[17] The Respondents mentioned that they were relying upon a constitutional right to a speedy determination, which right they alleged was breached.

[18] The constitutional right to be tried within a reasonable time referenced by the Respondents applies to pending criminal proceedings, not the determination of a Human Rights Complaint (Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44, [2000] SCR 307; Nisbett v. Manitoba (Human Rights Commission) 1993 CanLii 3366 (MBCA); and Canadian Airlines International Ltd. v. Canada (Human Rights Commission) [1996] FC 638).

[19] Notwithstanding the Respondents' submission, I find that the Respondents were in fact asking for a dismissal of the Complaint due to delay, or a breach of fairness and natural justice, and were not seeking constitutional relief. Given the jurisprudence on point, the absence of any notice, the lack of proper service, and the absence of sufficient grounds to support such a request, had there been such a constitutional question raised, it would have ultimately been denied.

[20] As aforementioned, the Complaint was completed (signed and certified by the Complainant) on May 5, 2010 and was filed on May 11, 2010. An initial Notice of Hearing provided that the Complaint was originally set down for hearing October 17 through October 19, 2012 inclusive before adjudicator Smordin (as he then was).

[21] Relevant to the Respondents' request to dismiss, a letter dated September 18, 2012 from counsel for the Commission addressed to Mr. Brousseau was filed. That letter included the date of the hearing and stated among other things:

> Despite numerous attempts to contact you by mail and telephone, the Commission has not received any acknowledgement from you with respect to these legal proceedings.

[22] On October 2, 2012 counsel for the Human Rights Commission wrote to (then) adjudicator Smordin, requesting an adjournment. That letter included the following comments:

> As you are aware, Mr. Walmsley is currently incarcerated at Headingly Correctional Institute and it is the Commission's preference that he attend the hearing to give evidence in person, to establish his complaint of discrimination. I was informed last week that the Subpoena issued by you to require Mr. Walmsley to attend is not sufficient to enable his attendance at the hearing and that an Order to Convey issued by the Court of Queen's Bench would be required. We are in the process of determining how to obtain such an Order and making the necessary arrangements.
>
> Accordingly, we respectfully request that the hearing be adjourned and rescheduled at a later date. If you are in agreement, we request that you communicate this decision to the parties in writing. The Commission will forward the letter to Mr. Walmsley and what follows is the Respondent's contact information…

[23] That letter does not show that it was copied to Mr. Brousseau. There was however no complaint by the Respondents before me respecting the receipt (or non-receipt) of the letter.

[24] As part of a package of further correspondence filed before me, there was a letter dated October 17, 2012 (it was actually dated as "2019" with a "2" written over the "9" in pen) from the Respondents addressed to (then) adjudicator Smordin.

[25] An excerpt of the Respondents' letter is set out below:

> I attended with my witnesses at your Human Rights Code hearing at 10:00 a.m. at the Keystone Room at Place Louis Riels (sic) on Wednesday, the 17th of October 2012.
>
> You were noticeably absent.
>
> This action has been brought by a corrupt individual who believes that everything that is in agreement with his personal desires seems true. Everything that is not, puts him in a rage. As a result, Mr. Walmsley has made life a living hell for himself and others around him.
>
> If any of the facts of the case have been reviewed in an Impartial manner, by somebody with a brain, there could be only one conclusion (sic).
>
> There is NO creditable evidence to the case and it should be DISMISSED. (sic)

[26] A review of the Complaint and the end date of the series of actions about which the Complaint is brought, makes it clear that the Complaint was brought within the then-applicable (prior to amendments to the Code having been enacted) six-month time period required. Had I found that the Complaint was late, I would have amended the Complaint in accordance with my jurisdiction under Section 40 of the Code and the evidence I heard to include an alleged period of contravention running up to and

including November 17, 2009. In so amending the Complaint, it would have certainly been filed within time as required by the Code.

[27] In any case, in response to the Respondents' letter, (then) adjudicator Smordin sent a letter to the Respondents (filed before me in evidence), in which he confirmed receipt of the October 17, 2012 correspondence aforementioned and advised that he had sent the Respondents a letter on October 9, 2012, advising that the hearing was adjourned due to Mr. Walmsley's unavailability to attend inter alia.

[28] Mr. Brousseau alleged before me that the Human Rights Commission was instrumental in causing delays. He argued that people's memories fade over time, that one unnamed witness was no longer available to provide evidence, and that too much time had passed between the alleged contravention of the Code, the Complaint, and the hearing date. He therefore asked that the matter be dismissed.

[29] For her part, counsel for the Commission indicated that this is the first time that the Commission was made aware of any intention to bring a request to dismiss for delay. Counsel for the Commission acknowledged that notices were sent out for the previous hearing dates. Counsel for the Commission further acknowledged that Mr. Brousseau was given notice of the initial hearing via courier. Counsel for the Commission explained that the Commission had written to (then) adjudicator Smordin requesting the adjournment in light of Mr. Walmsley's circumstances, as set out in her correspondence. Counsel for the Commission pointed out that the matter was clearly and obviously adjourned.

[30] Counsel for the Commission submitted that Mr. Brousseau did nothing to advance or set the hearing if he was concerned about delay. She pointed out that a pre-hearing conference was held and directions provided with no issue about delay ever being raised.

[31] Finally, she asserted there was no specific provision in the Code permitting the adjudicator to dismiss a matter for delay. Counsel for the Commission did recognize however that the adjudicator had a general right to govern their own process and had full authority to determine the procedures to be used at the hearing in accordance with various provisions of the Code.

[32] The adjudicator has the authority to govern procedure. This is in keeping with Section 39(2) of *The Human Rights Code*, which states that:

> Subject to this Code and the regulations, the adjudicator may determine the procedures to be used at the hearing and may receive at the hearing such evidence or other information as the adjudicator considers relevant and appropriate, whether or not the evidence is given under oath or affirmation, and whether or not it would be admissible in a Court of Law, unless the evidence is subject to any type of legal privilege.

[33] Section 42 of the Code grants adjudicators exclusive jurisdiction and authority to make determinations of fact, law, or mixed fact and law (subject to other provisions). If adjudicators have exclusive jurisdiction to determine questions of fact and/or law as well as the procedure to be used at the hearing, they have the ability to determine and control process generally.

[34] The broad wording of the section suggests that there would be jurisdiction, in an appropriate case, to dismiss a matter for delay. Given the broad statutory framework,

the authority accorded to the adjudicator, and the necessity to ensure a fair hearing, the adjudicator must, within the confines of his or her statutory authority, be permitted to determine such matters as dismissal for delay in an appropriate case. This is required both to ensure a just and fair process, and to ensure a level playing field is maintained as between the Human Rights Commission, the Complainant, and the Respondents.

[35] A lengthy unexplained delay that is contrary to the interests of fairness or justice that may cause undue prejudice which cannot otherwise be remedied, may give rise, in an appropriate case, to a request to dismiss for delay or to dismiss as an abuse of process, inter alia (Blencoe v. B.C. (Human Rights Commission) supra; Nisbett v. Manitoba (Human Rights Commission supra; Canada Airlines International Ltd. v. Canada (Human Rights Commission) supra). Any such Motion, however, must balance considerations of the detriment of delay with the over-arching and fundamental principles of fairness, and the principles enshrined in the Code as seen through the lens of paramountcy which the legislature attributed to the statute.

[36] In this case, the Respondents showed no substantive prejudice from the delay, despite being expressly invited to do so. The Respondents' assertion that there might have been a witness who became unavailable because of the delay was not persuasive.

[37] During argument, the Respondents were offered the opportunity to provide the name of the witness during the course of their case and advise as to what evidence the Respondents might have anticipated from such an individual. I was prepared to consider such submissions and accord them appropriate weight to the extent necessary

to ensure justice was done and that no prejudice ensued if there was an issue arising from the unavailability of a witness. This process would have been in accord with Section 39(2) of the Code.

[38] In fact, the Respondents made no such submissions and failed to advise me of the name of any unavailable witness. The Respondents showed no prejudice whatsoever, let alone significant prejudice. There was nothing reliable put before me to suggest that the Respondents' ability to have a fair hearing was compromised. For its part, the Commission explained the delay. The Complainant's position was in accord with that of counsel for the Commission.

[39] Given that ensuring compliance with *The Human Rights Code* is, as set out in the preamble to the Code, of paramount and fundamental importance, given the ongoing ability for the Respondents to have a fair hearing, and for the other foregoing reasons, there was no basis to dismiss this complaint for delay or otherwise. The Respondents' request to dismiss was therefore dismissed.

The Complaint

[40] In his Complaint, the Complainant alleged that he commenced his employment at Brousseau Bros Ltd. o/a as Super Lube in July 2009 as a lube technician. His employment came to an end in November 2009.

[41] In his Complaint, the Complainant alleged that the manager who hired him was a woman named Heather Kirton, also known as "Hez". He alleged that Ms. Kirton began to make unwelcome comments to him during his first month of employment. The

Complaint specified that some of the unwelcome comments made to him by Ms. Kirton during that first month, included the following:

> I like my dicks like I like my diesels – big.

[42] Another example of the unwelcome comments the Complainant alleged in his Complaint were directed at him by Ms. Kirton, involved her telling him that: "Everyone wants to see us get together".

[43] In his Complaint, the Complainant described the following incident:

> On Saturday (either September 19 or 26, 2009), I was working in the shop painting along with Hez plus two other employees. Hez bought beer and began serving me one after another. Before I knew it, the other two employees had left and I was alone with Hez. I had become intoxicated, and upon the suggestion of Hez, I lied down. Without knowing or consenting, Hez began to perform oral sex on me, which quickly escalated into sexual intercourse. Several times I said to Hez that we shouldn't be doing that, with Hez telling me 'No, it's ok'."

[44] The Complainant claimed among other things that he returned to work on Monday, when Ms. Kirton allegedly told him: "Everyone knew we would end up together." The Complaint described several other disturbing communications from Ms. Kirton to him as well.

[45] The Complainant alleged that he advised Ms. Kirton that he did not want to suffer the re-occurrence of such an event. In his Complaint, he stated:

> Not wanting this to continue, I took Hez aside and told her everything that happened was a mistake, and that it cannot happen again. Hez's mood went from happy to warpath. She told me, 'Don't void me out like the plague' and 'I know where to find you'.

[46] The Complaint, containing sixteen numbered paragraphs, included various other allegations, including that following the aforementioned incidents, Ms. Kirton tried on "countless occasions to have sex with me" and made many inappropriate comments and engaged in inappropriate touching. The Complaint further alleged that Ms. Kirton gave the Complainant two CDs with explicit pictures so that he could "think about it some more".

[47] In his Complaint, the Complainant asserted that following these incidents, he started to miss work. He stated that he found that Ms. Kirton's attempts to have sexual relations with him were becoming so frequent and disturbing that he could no longer go to work.

[48] In his Complaint, the Complainant alleged that on November 6, 2009, he received a phone call from Ms. Kirton in which she told him that she was pregnant, and then hung up on him. The Complainant further alleged that:

> Hez was becoming so confrontational that I became afraid to go to work and then have to say "No" to her and I found that I was unable to do my job.

[49] In his Complaint, the Complainant claimed that on November 6, 2009, he wrote to Al Cousins, an individual he earlier described as the district manager, and advised him of the unwelcome comments and conduct to which the Complainant alleges he was subjected. The Complainant contended that he asked Mr. Cousins if he could help him resolve the matter so that he could get back to work. The Complaint then set out several other attempts he made to deal with the matter both through Mr. Cousins and through the president of the company, Jim Brousseau.

[50] The Complainant alleged in his Complaint that he made several repeated efforts to contact the president of the company on November 17th and November 18th, 2009 to discuss the problems he stated he experienced. He asserted that on November 18, 2009, he spoke with the president of the company and asked him what he intended to do about the "sexual harassment I had been experiencing from Hez".

[51] The Complainant alleged in his Complaint that Mr. Brousseau responded by saying to him: "Not my problem, phone the police". He claimed that shortly thereafter, the conversation terminated.

[52] The Complainant contended in his Complaint that on November 25, 2009 he received a phone call from "Jim" (Mr. Brousseau, the president of the company). He described that event thusly:

> On November 25, 2009 I received a phone call from Jim who asked me where the money was that I owed him for the window I had broken. I said I had never broken a window. Jim asked me if I denied it and I said yes. I asked him when this alleged offence took place and Jim refused to answer me, and once again hung up on me. I subsequently received a Record of Employment in the mail; however, I had never been told by anyone that my employment had been terminated.

[53] The Complainant concluded his Complaint by charging that he was subjected to:

> …a series of objectional and unwelcome sexual solicitations or advances in my employment, and that the Respondent knowingly permitted, or failed to take reasonable steps to terminate the harassment, and instead terminated my employment, contrary to Section 19 of *The Human Rights Code*.

[54] The Complaint form mandates that the Complainant certify the correctness of the information contained in the Complaint to the best of the Complainant's knowledge,

together with the Complainant's belief that there had been a breach of the Code. The Complainant did certify that his Complaint was correct to the best of his knowledge on May 5, 2010. The Complaint was filed May 11, 2010.

The Response to the Complaint

[55] Among other things, the Respondents' Response denied any sexual harassment. The Response included the following statements:

> Mr. Jason Walmsley joined Super Lube Autocentres on July 25, 2009. At that time, we were well aware of Mr. Walmsley's problems with drugs. We had hoped that these past difficulties were in fact in the past and we were optimistic about his future.
>
> After missing four scheduled shifts and with no contact from Mr. Walmsley, an email was received on November 9, 2009. In this email, Mr. Walmsley made a number of accusations about his team leader, Ms. Kirton. Mr. Walmsley offered these accusations as the reason why he failed to show up for work.
>
> After some discussion, a second email was received. In this email, Mr. Walmsley suggests that Ms. Kirton should be fired and that he, Mr. Walmsley was well qualified to do her job.
>
> It was further stated by Mr. Walmsley that if we did not accept these terms, he would be tendering his resignation and filing a complaint with The Human Rights Commission.
>
> On November 18, 2009, Mr. Walmsley attempted to gain entry into our building at 1415 Regent Avenue by breaking the glass window. The police were summoned and Mr. Walmsley fled. On December 4, 2009, Mr. Walmsley was sent his Record of Employment. His employment was terminated.
>
> I would think this explanation, enclosed emails, and police report would bring this matter to a close."

[56] The response is signed by J.E. Brousseau. No enclosures as referred to in the Response were provided me in advance of the hearing, notwithstanding the

requirement that the Commission provide (or cause to be provided) a copy of the Complaint and the Reply (Section 33 of the Code).

The Evidence and Findings

[57] At the hearing, contrary to the allegations he set out in his Complaint, the Complainant testified that in fact he voluntarily consented to have sexual relations with Ms. Heather Kirton on two occasions, including the one described above. This evidence coincided with the background facts submitted in the Brief filed by counsel for the Manitoba Human Rights Commission prior to the hearing.

[58] Notwithstanding his Complaint, Mr. Walmsley testified at the hearing that he was "intrigued" from the start by what he described as Ms. Kirton's advances and willingly participated in sexual activity with her on the two occasions he described. Mr. Walmsley testified however that after the second encounter, he decided not to have any further sexual relations with Ms. Kirton and communicated that to her. He testified that Ms. Kirton however, continued to pursue him in what he described as an inappropriate fashion.

[59] Mr. Walmsley stated that after he asked Ms. Kirton to stop her advances toward him, Ms. Kirton continued to make inappropriate gestures consisting of touching his arm, touching his face, touching his buttocks, and touching his chest. He also testified that Ms. Kirton provided him two CDs containing explicit nude photographs of her in various poses, which were tendered into evidence (Exhibit 12 in these proceedings), and made certain unwelcome comments to him.

[60] The contradictions between Mr. Walmsley's evidence at the hearing and the allegations he certified to be correct in his Complaint were distressing. They ranged from his obvious failure to disclose the true nature of his interactions with Ms. Kirton, at least initially, to particulars of events he described, to his wrongful denial of vandalizing the Respondents' shop/garage, among other things. I will set out some of those contradictions below, though what follows is not an exhaustive list.

[61] Whereas in his Complaint Mr. Walmsley alleged that Ms. Kirton bought him beer and before he knew it, he had become intoxicated such that without his knowledge or consent Ms. Kirton began to perform oral sex on him, which escalated to sexual intercourse, his evidence at the hearing was considerably different. At the hearing, he testified that he was a willing consenting participant. The evidence also revealed that it was Mr. Walmsley who purchased the beer, albeit with money provided by Ms. Kirton.

[62] Mr. Walmsley's failure to disclose in his Complaint that he had been "intrigued" by Ms. Kirton's advances is, at a minimum, problematic. Mr. Walmsley's failure to disclose that he consented to having sex with Ms. Kirton twice, once during work hours, is vexing, given that in his Complaint he specifically certified the correctness of his comment that the sex occurred without his consent.

[63] The glaring contradictions between some of the alleged facts and matters Mr. Walmsley complained about in his Complaint on the one hand, and his oral evidence on the other are most striking. They therefore merit further consideration, bearing in mind that it is the Commission who has carriage of the Complaint and the Commission and

the Complainant who must, at least initially, satisfy me on a balance of probabilities that the Code was breached in the manner alleged in the Complaint.

[64] A stark example of the contradictions between Mr. Walmsley's Complaint and his evidence at the hearing can be found at paragraph 16 of the Complaint. Whereas Mr. Walmsley's Complaint suggests that he was wrongly accused of breaking a window at the Respondents' shop/garage, before me he testified that in fact he did break that window. Mr. Walmsley testified that using his weapon of choice, a can of mushroom soup he placed in a sock, he broke one of the windows of the shop/garage, for which he never paid restitution. This revelation came notwithstanding that, as aforementioned, Mr. Walmsley certified that his Complaint, in which he appeared to deny breaking the window, was truthful.

[65] In respect of the same broken window incident, curiously in the Brief filed on behalf of the Commission, the following statement appears:

> In or about the late evening of November 17, 2009, the Complainant threw a rock that went broke window of the Shop's overhead door. (sic) (emphasis added)

[66] Thus, as it pertains to the broken window, Mr. Walmsley appears to have told at least two and possibly three differing versions of the cause of the broken window. He certified that he did not do it, counsel for the Commission understood that he threw a rock that broke the window (or at least so informed this adjudicator in the Brief filed), and he testified, as aforementioned, that he deliberately broke the window utilizing a can of mushroom soup he carried in his backpack at night, outfitted in a sock. The only reasonable conclusions that can be drawn from all of this are that Mr. Walmsley

repeatedly did not tell the truth and that he did in fact break the window of the Respondents' shop/garage.

[67] In addition to the foregoing matters, there were other incidents of non-disclosure or incomplete or erroneous information that Mr. Walmsley included in his Complaint. For example, Mr. Walmsley wrongly set out the possible date of the sexual encounter described in his Complaint, being September 16 or 25, 2009. In his oral evidence, Mr. Walmsley stated that the actual date was September 12, 2009, which he advised he discerned once he reviewed a calendar kept by his mother.

[68] Nothing significant turns on that date, however given the fact that Mr. Walmsley's oral evidence that he had consented to two sexual encounters and that the sexual advances, whether made by Ms. Kirton or him, were initially not unwelcome, plainly contradicted his Complaint, and given other credibility issues, he and the Commission ought to have, at a minimum, amended the Complaint much earlier in the proceedings rather than proceed on the basis of facts which they knew or ought to have known were, in several key respects, erroneous. I will have more to say about this later in this Decision.

[69] In oral evidence, Mr. Walmsley voluntarily confessed to having done crack cocaine at the shop/garage while on duty with certain employees, one of whom was subsequently fired and the other demoted. He also testified that he smoked marijuana with yet other employees at the shop/garage during work hours. Both Mr. Curtis and Mr. Hoebbe, employee-witnesses called by the Respondents, testified that there were

drugs being used during work hours. Mr. Curtis testified that both he and the Complainant (amongst others) smoked marijuana during working hours.

[70] Although Mr. Walmsley neglected to mention the prevalence of his and others' drug use in his Complaint, Mr. Walmsley's failure to do so does not go to the heart of the Complaint. Despite the Respondents' suggestion to the contrary, Mr. Walmsley's participation in illegal activities and his failure to mention them in his Complaint does not nullify or even minimize the Complaint. While such endeavors may be relevant and may affect credibility and reliability, given both the nature of the Complaint and the type of remedy sought by Mr. Walmsley and counsel for the Commission, Mr. Walmsley's participation in these activities, while not condoned, is not fatal to the Complaint itself.

[71] Mr. Walmsley testified that he told his mother everything with respect to his addiction and drug use. He stated that he did not share as much information with his father, with whom he said he had grown somewhat distant. Here again, a difficulty arises in terms of Mr. Walmsley's credibility and reliability.

[72] The evidence reveals that Mr. Walmsley did not tell his mother that he was using marijuana, while employed with the Respondents. Ms. Walmsley testified that she was not aware and did not know that her son was using marijuana. In fact, she testified that she did not believe he was using marijuana.

[73] While Ms. Walmsley appeared to be genuine in her testimony, her evidence was largely based upon information she was told by her son. Accordingly, quite apart from other factors, the weight that I can give much of her information is limited.

[74] Mr. Walmsley testified that he had dropped out of school at 14, following the time he stole his father's credit card and purchased crack cocaine. Mr. Walmsley testified that after that time he lived on the streets for a period and suffered some of the grim consequences one might fear may be occasioned from such an existence.

[75] Mr. Walmsley testified as to his extensive involvement in using illegal drugs for a great deal of his life (not just for the limited period of his employment with the Respondents), from his adolescence and extending into his adult life. For example, in his testimony Mr. Walmsley volunteered that in 2012 he participated in what he described as a "crack binge", which he said lasted over 744 hours. He testified that during that time, he broke into 47 separate businesses across Winnipeg, including between two to four of the Respondents' outlets, and stole money from them. Mr. Walmsley testified that he admitted to police his involvement in the aforementioned criminal attacks, including the November 2009 breaking of the Respondents' shop/garage window. He disclosed that he is presently serving a sentence of 5.5 years (less time served) in jail because of these offences.

[76] These activities form only part of what can only be described as a lengthy and unfortunate history of multi-layered problems, bad decision-making, self-centered behavior, criminal activity, and active engagement in telling short-sighted falsehoods extending to the filing of a Complaint, which he knew contained falsehoods and half-truths. This destructive, self-destructive, and selfish behavior is made all the more tragic when juxtaposed against both the articulate, focused, and earnest individual who appeared before me, and in considering the evidence of his exhausted but caring and supportive mother, and his bedeviled and baffled father. In describing Mr. Walmsley

thus, I in no way excuse, condone, or white-wash the Complainant's negative behavior. I note however that there is much that is worthy and redeemable underlying Mr. Walmsley, notwithstanding his past behavior.

[77] The Complainant testified and wanted me to accept that notwithstanding his admitted past behavior, he has now turned the corner and was being truthful. He stated that for him, bringing this matter to a conclusion and telling his story was one, if not the only, thing that kept him going in his darkest times.

[78] The Complainant testified that some years ago, following his aforementioned "crack binge" and medical repercussions he has suffered from his drug use, he hit rock bottom. Mr. Walmsley testified that he has, since that time, taken stock of his life and wishes to make amends. His position is that although he had been untruthful throughout most of his life, he was telling the truth in terms of the sexual harassment he suffered.

[79] I pause here to note that the 2012 break-ins and "crack binge" for which Mr. Walmsley was convicted and is serving time in prison forms no basis of my decision as to whether or not the Code was breached in the manner alleged in the Complaint. The Complaint before me addresses an allegation of sexual harassment allegedly occurring in 2009. It does not address the very troubling subsequent behavior that Mr. Walmsley put before me.

[80] The fact that Mr. Walmsley's 2012 criminal actions do not have any bearing in my decision, does not derogate in any way from the fact that Mr. Walmsley's credibility in

his Complaint (and the credibility of the other witnesses) is a factor requiring careful consideration.

[81] In his evidence, Mr. Walmsley testified that he had, in fact, lied to various individuals. Specifically, Mr. Walmsley testified that for:

> …the majority of my life, truth hasn't been particularly synonymous with my name, but this is one of the only things over the last 5 years that I've actually been truthful about.

[82] Mr. Walmsley testified about his educational and work history. He stated that in the time preceding the incidents giving rise to the Complaint, he had returned to complete his Grade 12 equivalency in 2009, from which he claimed he graduated with honours. Mr. Walmsley testified that he began his employment at Super Lube on July 25, 2009.

[83] In his direct evidence, Mr. Walmsley testified that he had worked at various places of employment both prior to and following his employment with the Respondents. He testified that these jobs did not last long. He testified as to his employment immediately prior to obtaining his job with the Respondents at the Great Canadian Oil Change company. He testified that he had been employed in a similar position at the Great Canadian Oil Change to that for which he was hired by the Respondents.

[84] He stated that he sought employment at Super Lube because:

> A: Super Lube is 13 minutes from my home in Oakbank. It's very close to where I live. It's a straight shot down 206, Dugald, and I'm there. I was looking for something closer to home.
>
> The Great Canadian Oil Change I had worked at was in the south side of the city. The commute and the prices of gas at the time

> were, was a lot. And $9 an hour doesn't really do much for paying for gas at that point, so—

[85] Mr. Walmsley testified in what appeared to be a proud manner that he was pretty well hired on the spot. In cross-examination, during which time his demeanor became more hostile and impatient, Mr. Walmsley was revealed not to have been entirely truthful in his evidence.

[86] In cross-examination Mr. Walmsley admitted (after noting his objection to the question, which was over-ruled) that he worked at the Great Canadian Oil Change for approximately 2-3 months and that his employment was rocky. He said he did not get along with the others. When confronted directly, he admitted that he stole money from the Great Canadian Oil Change and that his employer caught him. He acknowledged that he left at that point, having been fired from the Great Canadian Oil Change company.

[87] Despite testifying that he had turned a new leaf respecting honesty and credibility in this respect, he was less than forthright, or perhaps engaged in sophistry in the manner in which he gave his evidence. It was also in cross-examination that he admitted to his use of marijuana at the Great Canadian Oil Change company.

[88] The fact that Mr. Walmsley did not admit to what happened at the Great Canadian Oil Change company in his direct examination, given his other admissions and instead attempted to imply, if not state, that there was a different series of events that led to his employment with the Respondents, suggests that Mr. Walmsley's pattern of credibility and/or reliability problems continue to persist and may not have been fully confined to an earlier period in his life.

[89] There is much one could say about the lack of bona fides and deliberately misleading evidence exhibited in much of Mr. Walmsley's Complaint. That however does not mean that each and every aspect of Mr. Walmsley's Complaint can be discounted and entirely disbelieved when measured against the evidence I heard from some of the other witnesses, including Ms. Kirton (about which more will be said below).

[90] It must be said in considering Ms. Kirton's evidence that her employer, the Respondents, described Ms. Kirton as being "special needs". Mr. Brousseau suggested in his questions and his statements that Ms. Kirton was intellectually challenged. He did so in a cavalier, insensitive, and brazen fashion.

[91] In fact, no evidence was led before me to support Mr. Brousseau's contention. Every one of the Respondents' employees rejected any such assertion. While many of the witnesses testified that Ms. Kirton made up stories about herself and was moody, there was nothing to support Mr. Brousseau's assertion.

[92] That the Respondents would attempt to portray the assistant manager of one of their shops/garages and an ongoing employee as being "special needs" was a real disservice to her and was less than appropriate. The fact that the Respondents put no supports in place for her and instead made her an assistant manager with the responsibilities that she had, lent a strong measure of incredulity to the Respondents' claims in that respect.

[93] In my estimation, although not proven to have "special needs", after observing the manner in which Ms. Kirton provided her evidence, I conclude that Ms. Kirton's evidence did suffer from faulty memory and vagueness. These problems went far

beyond being matters of poor memory alone. In many instances I conclude her weak recall and vagueness were deliberate. Though there are many possible examples of this, only a few will follow.

[94] In one instance, Ms. Kirton testified in a vague manner that she did not recall if the incident which culminated in her having sex on a cement floor in an oil change garage (which I was told was a unique experience for her) occurred on a Saturday or Sunday. A few minutes later in cross-examination, she had strong recall of the events of what she confirmed was a Saturday night.

[95] In another instance Ms. Kirton denied, or did not recall, paying for beer. She stated: "I don't think I would do that." when asked if she might have purchased beer that day. Ms. Kirton's evidence was not reliable in this respect. Both Mr. Curtis' and Mr. Walmsley's evidence was that Ms. Kirton paid for beer on September 12th. I do not accept Ms. Kirton's evidence respecting the purchase of beer, and prefer the oral evidence of Mr. Walmsley as confirmed by Mr. Curtis in this respect.

[96] Ms. Kirton's manner when delivering her evidence in the aforementioned incidents and in respect of the CDs (which is described later in these Reasons) was such that it was plain she was trying to tweak her evidence to enhance her position. Given that she described the occurrences with Mr. Walmsley as out of the ordinary and having never happened before or since, one would expect her to have better recall. This is especially so as she testified that the events complained about continue to haunt her.

[97] Significant time was spent by the parties in addressing Ms. Kirton's position with the Respondent companies. The evidence as to which employee was the manager and which was assistant manager, evidence one might expect not to be contradictory or controverted, was surprisingly inconsistent among the various witnesses. In his direct evidence, Mr. Walmsley testified that Ms. Kirton was the manager. He testified that when she hired him, Ms. Kirton asked if he had a problem working for a woman. He maintained the position that she was the manager up to and including in his closing arguments.

[98] Mr. Walmsley maintained that John Leullier was the district manager, not the manager of the particular shop/garage for which he was employed. He said that Mr. Leullier showed up every week or two to check deposits. He described Mr. Leullier's attendance as infrequent. He particularly drew the adjudicator's attention to the fact that there was no team leader as described in the Respondents' reply to the Complaint.

[99] Mr. Shaun-Kyle Hoebbe, an employee of the Respondents' company and previously a co-worker of the Complainant, was called by the Respondent as a witness. Mr. Hoebbe testified that Ms. Kirton was the assistant manager. He testified that the manager was Mr. Leullier, and before him one Ed McDonald.

[100] Sean Curtis, another of the Respondents' employees, referred to Mr. Leullier as both a regional manager of all the shops and as manager of the particular shop/garage. He described himself and Ms. Kirton as assistant managers.

[101] Mr. Leullier testified he was the manager and stated that Mr. Curtis was not at any time an assistant manager. Mr. Leullier described Ms. Kirton as an assistant manager.

[102] Ms. Kirton, for her part, maintained that she was the assistant manager and that Mr. Leullier was the manager at all material times. She did not identify Mr. Curtis as an assistant manager.

[103] The foregoing evidence suggests either an unclear chain of command or a lack of basic knowledge amongst the Respondents' staff, among other possible explanations. That said, I am able to conclude that Ms. Kirton was, on a balance of probabilities, the assistant manager.

[104] Whatever her official designation, which is a matter of lesser importance, I find that she was cloaked with the authority to hire and fire, set schedules, call people to work, and note up/complete the payroll for the shop/garage. Ms. Kirton worked in the front office and in the shop and was in a position to confer certain benefits. These included noting certain employees as being present when they were not in fact at work. Although Ms. Kirton denied that she would ever do such a thing, Mr. Walmsley testified she did just that for him. Whether she did or did not make any such false entries is not the point, although on a balance of probabilities, I would have found that she likely did make such entries.

[105] During the course of his evidence, Mr. Walmsley testified as to various times he was away from work including at various treatment facilities (including the Behavioural Health Foundation and Crisis Stabilization Unit). For example, he testified that during

the course of his employment with the Respondents, he had been admitted into the Crisis Stabilization Unit in Selkirk. He did not, however, draw anything but a loose connection between those difficulties and the Complaint before me.

[106] Neither the Complainant nor counsel for the Commission elected to produce any psychological or medical evidence whatsoever to substantiate the reasons for admission to these facilities or any connection at all between the admission and the Complaint. Accordingly, little or no reliance can be placed on any supposition that such a connection exists.

[107] In the event the Complainant or counsel for the Commission intended to convince me that Mr. Walmsley's self-described drug addiction made him more vulnerable, they ought to have adduced more and better evidence, perhaps including some psychological or medical evidence. On the evidence before me, I cannot find that Mr. Walmsley's previous drug addiction or the use of drugs in this work environment made him more vulnerable to the alleged sexual harassment.

[108] In fact, Mr. Walmsley presented as anything but vulnerable. Both of Mr. Walmsley's parents testified as to the strength of his will. Mr. Walmsley's father testified that Mr. Walmsley could not be compelled to do that which he did not wish to do. The Complainant himself was not of a dissimilar view. Given those facts and his overall demeanor when testifying before me, as well as the absence of any medical or psychological evidence to support the view that Mr. Walmsley was vulnerable, no such finding can be made in this proceeding.

[109] In terms of the comments that Mr. Walmsley alleged Ms. Kirton made prior to the sexual encounters, no one argued that those comments constituted sexual harassment as defined under the Code. I will accordingly refrain from commenting other than to note that no one should infer that this Decision condones such workplace comments or believes them to be the subject of acceptable workplace banter.

[110] Likely the reason no such arguments were advanced is due to the fact that to constitute harassment, Section 19(2) provides that the comments and actions in issue must be unwelcome. The evidence seemed to imply that they were welcome, or at least not unwelcome. Mr. Walmsley's evidence that he was intrigued supports this view. Indeed but for Mr. Walmsley's evidence on that point, a very different finding may well have been made (see Bannister v. General Motors of Canada Ltd. 1998 CanLii 7151 (ON CA) (1998) 164 D.L.R. (4th) 325, 40 Q.R. (3rd) 591 (Ont. C.A.).

[111] I note that neither Ms. Kirton nor any other employee were cross-examined on the alleged diesel simile she allegedly employed. Accordingly she had no opportunity to address the issue. In the circumstances, no adverse finding can be made against her in respect of that alleged comment, which if it was made, was likely intended, based upon Mr. Walmsley's evidence, and was taken by him to be flirtatious.

[112] The evidence of Mr. Walmsley and Ms. Kirton differed substantially in terms of who initiated the "flirting". Mr. Walmsley testified that although he was intrigued by Ms. Kirton, he did not know how to initiate an encounter. Ms. Kirton testified that Mr. Walmsley was the more dominant of the two and the individual who initiated the contact and pursued her.

[113] Mr. Walmsley's father's evidence was that he advised his son not to pursue Ms. Kirton. This suggests that at least as far as Mr. Walmsley Sr. understood it, it was his son pursuing Ms. Kirton, or contemplating doing so, not the other way around.

[114] Mr. Hoebbe's evidence seemed to suggest that either it was Mr. Walmsley who commenced the pursuit, or it was a matter of each of Mr. Walmsley and Ms. Kirton both being mutually interested. Mr. Hoebbe stated in his evidence:

> I just wouldn't really call it harassment, like, because if Jason flirts with, you know, someone, and then someone kind of bites at that, that, what is that, like?

[115] On another occasion, when asked, whether he was aware of any sexual harassment, Mr. Hoebbe stated:

> Yes, as far as the sexual harassment, I wouldn't really call it sexual harassment. I mean, like, you know, if two adults kind of, you know – I don't know.
> The Adjudicator: It's okay to use frank language, sir, so please, go ahead.
> The Witness: Well, it takes two to play, right?

[116] Similarly, Mr. Curtis testified that Mr. Walmsley asked him for his permission to have some kind of relations with Ms. Kirton. Mr. Curtis testified that he responded to Mr. Walmsley by saying, among other things:

> Go for it, she likes them young.

[117] Upon further questioning, Mr. Curtis testified that it was Mr. Walmsley who pursued Ms. Kirton, not the other way around. He testified as follows::

> Ms. Khan: … Jason was, he was kind of interested in her when he first started working there?

A: You might call it being the aggressor, yes.

Q: And she was flirting with him and making some sexual innuendos –

A: No.

Q: --that interested him? Sorry?

A: She never made any sexual innuendos.

Q: Are you aware that she made comments like – are you aware of any comments like, I like my dicks big like my diesels?

A: No.

[118] Mr. Curtis' evidence that Mr. Walmsley asked for permission to pursue Ms. Kirton corresponds with Mr. Walmsley's own evidence in that respect. It is reasonable to conclude on a balance of probabilities that initially it was Mr. Walmsley who was pursuing Ms. Kirton at least in an equal (if not greater) part than Ms. Kirton's pursuit of him.

[119] The evidence before me simply does not support the contention that Mr. Walmsley perceived any unwelcome conduct or harassment, as that term is defined in the Code, at least up to and including the time of the second sexual encounter. Until then, Ms. Kirton's comments and conduct were welcomed by him according to his evidence.

[120] Mr. Walmsley testified that subsequent to his second consensual sexual encounter with Ms. Kirton, he discussed the matter with his father. Mr. Walmsley also offered that certain circumstances of the second sexual encounter (which need not be repeated here) were so disturbing to him that he did not wish to have any further sexual encounters with Ms. Kirton. He testified that he told Ms. Kirton that the sexual

encounter was a mistake and that it could not and would not happen again. Mr. Walmsley testified that Ms. Kirton went on a warpath after he rejected her.

[121] His father's evidence was that while there was a discussion, there was no disclosure that there had actually been a relationship or encounter. He said only that his son had sought his advice in terms of the circumstances generally.

[122] Ms. Kirton on the other hand testified that she simply lost interest after the second encounter. Ms. Kirton testified she was not on the warpath and did not harass Mr. Walmsley. She testified that after she lost interest, the "sexual magnetism" petered out and nothing further of note occurred between them.

[123] Regardless of who pursued whom up to and including the second sexual encounter, the evidence supports the contention that after that time, Mr. Walmsley said he did not want and/or was not comfortable with the continuation of the sexual encounters.

[124] While in our society no must mean no, and a person is entitled to reject sexual advances after a consensual sexual relationship and have that rejection respected, in this case the issue is whether harassment as defined in the Code occurred. Here, Ms. Kirton denied harassing Mr. Walmsley entirely. She maintains that she did not continue to pursue Mr. Walmsley but simply lost interest in him. If I believe her, then the Complaint must be dismissed.

[125] Mr. Walmsley on the other hand maintained at the hearing that he said no and was then harassed by Ms. Kirton. The details of the harassment that he alleged at the

hearing following his consensual relationship with her consisted of the provision of the CDs referenced above, as well as her providing him a picture of a tumour she alleged she had (which counsel suggested was an invitation to have a sexual encounter with her one more time as she was dying), comments made by her, and various aspects of touching. If I believe Mr. Walmsley's version of events as he disclosed them at the hearing, even though certain key elements were contrary to aspects of his Complaint, then his Complaint would have some merit.

[126] Where Ms. Kirton's evidence was contradicted by Mr. Walmsley's, and Mr. Walmsley's evidence was corroborated by another more reliable witness, notwithstanding Mr. Walmsley's own credibility problems (most especially in his Complaint), I cannot accept Ms. Kirton's evidence, and prefer Mr. Walmsley's. Where Mr. Walmsley's evidence was contradicted by Ms. Kirton and there is no corroborative evidence one way or the other, I was left to choose between the evidence of a witness who admitted he was generally not truthful (other than in this case, he assured me – which assurance was not completely borne out by the facts) and a witness who admitted to being flustered, of poor memory, whose employer described as being "a brick or two short from an entire load", who, the Respondents' other witnesses testified, made up fanciful, untruthful stories during the period of her employment, and who I found to have been problematic in parts of her evidence.

[127] Given Mr. Walmsley's credibility and reliability problems, absent corroboration, Mr. Walmsley's evidence cannot be significantly relied upon. I need not conclude that the contradictions in Mr. Walmsley's evidence lead inexorably to the conclusion that he intended to deceive, although they may. Possibly, the contradictions reveal an inability

for Mr. Walmsley to discern between fact and the web of fiction that he had created over the years as he has had to cope with the problematic decisions he has made and their consequences during that time in his life.

[128] In any case, as counsel for the Commission submitted in her closing argument, the critical timeframe upon which to focus is that following Mr. Walmsley's advice to Ms. Kirton that he was no longer interested in her. That is, counsel for the Commission stated that notwithstanding the Complaint, I should focus my attention on the period following the consensual sexual relationship. Counsel for the Commission submitted that that would have been sometime in or about the third week of September.

[129] Ms. Kirton's evidence respecting this timeframe was plagued by several difficulties. Quite apart from her admissions that her memory was faulty, in several key respects her evidence was simply not believable. The clearest example of this relates to the evidence she gave respecting the two CDs containing pictures of her in various nude poses that she provided to Mr. Walmsley.

[130] Prior to hearing Ms. Kirton's evidence, Mr. Curtis gave his evidence. Mr. Curtis testified that Ms. Kirton had told him that Mr. Walmsley had removed the CDs from her desk. Mr. Curtis was quite adamant in his evidence and presented in a manner suggesting that he harboured a certain negative attitude towards Mr. Walmsley. I make this comment based upon the manner and tone in which he presented his evidence.

[131] Ms. Kirton's evidence respecting her provision of the CDs to Mr. Walmsley defied logic and contradicted her co-worker's, Mr. Curtis', evidence. Some excerpts from the

relevant testimony are telling. At one point, counsel for the Commission asked this series of questions:

> Q: Do you recall giving Mr. Walmsley two CDs with photographs on them?
>
> A: I didn't give him anything.
>
> Q: So let me ask you this. There were two CDs that have photographs of you on them?
>
> A: Yes, there was, yes.
>
> Q: And those photographs, just to be clear, are, I'm going to say explicit photographs of you?
>
> A: They're tasteful, because my sister and I both were wanting to put pictures into a, what's it called, that girl's magazine or whatever.

[132] And later,

> Q: You had those CDs with you at work in September of 2009?
>
> A: The CD's, my sister had sent them to my, sent them by mail or whatever it was, it was in one of those Purolator envelopes I think, or whatever.
>
> Q: Okay.
>
> A: And because she sent them to my work I put them, I had them in my locker.
>
> Q: So she sent them to your work, you had them in your locker?
>
> A: Yes.
>
> Q: Mr. Walmsley had them in his possession at some time, right?
>
> A: Yes, because someone had broken into my stuff, and then I asked – and I was talking about, like, putting them somewhere safe or keeping them somewhere safe so I could – so they wouldn't get stolen or damaged or, because they were really important to me and my sister.

Q: Okay.

A: So, and Jason had came in and he said that he would keep them safe for me, and I said, okay, thank you. Because I handed them to him once I realized that some of my stuff, that she had sent, were stolen.

Q: Okay. And you said Sean Curtis was there as well, when Jason came in and took the CD?

A: Well, he was, yeah, him and I were discussing it, because I told him that someone had stolen all these pictures.

Q: Okay.

A: And it was upsetting, because I was already upset, yes.

Q: So Sean was there, you were talking to him about it, and then Jason came in and said, I can keep them for you, or what did he say to you?

A: He said that yes, he can keep the CD for me to make sure it was safe.

Q: And where was he going to keep them? Because he was at the shop too?

A: Oh, I don't know. I thought at least it was safer with somebody, it being with somebody else so there was no way of anyone getting ahold of them.

The Adjudicator: Why wouldn't you take them to your house?

The Witness: Oh, that was my plan, taking them out, but I was going to be there all day, I just wanted to get them out of the shop so whoever it was couldn't get ahold of them again.

[133] In cross-examination and in response to a request for clarification from the adjudicator, Ms. Kirton testified that in fact she had received the CDs sometime between June and September 2008.

[134] Ms. Kirton had no logical explanation for why she would have kept these CDs that were important to her containing intimate pictures of her at a work for the period

between September 2008 (at the latest) and approximately September 2009. She could not reasonably explain why she would not take her CDs home for safekeeping. Instead, her evidence in that respect was riddled by contradictions punctuated by pleas of faulty memory.

[135] For example, Ms. Kirton testified both that she "had every intention" of taking the CDs that she said were important to her home but kept forgetting about them. Then she suggested her house was not an honest place for them at all.

[136] Ms. Kirton under cross-examination contradicted Mr. Curtis' evidence in terms of the CDs. She testified that she would never accuse Mr. Walmsley of stealing the CDs. Mr. Curtis on the other hand stated that Ms. Kirton told him just that and would not give them back.

[137] I believed Mr. Curtis in his evidence that Ms. Kirton had told him a different version of events. Mr. Curtis had nothing to gain or lose in providing the evidence he did. More likely than not, he believed he was helping Ms. Kirton in providing his evidence.

[138] In fact, Mr. Curtis' evidence supports Mr. Walmsley's contention. Ms. Kirton left Mr. Curtis with the impression that her CDs were taken, not that she gave them to Mr. Walmsley. In this, she was misleading.

[139] The one statement regarding the provision of the CDs that was consistent throughout was Mr. Walmsley's, namely that Ms. Kirton had provided him the CDs after their sexual encounter in order to entice him into further activity. This is the most

reasonable explanation for Ms. Kirton providing those CD's to Mr. Walmsley based on the evidence I heard.

[140] The fact that Ms. Kirton seemed to change her story with such frequency on what she testified was an important matter to her, being the existence of the CDs, suggests that her evidence cannot be relied upon in that respect.

[141] Curiously, Mr. Leullier's evidence in respect of the CDs noted the oddity of Ms. Kirton's position.

[142] In his cross-examination, the following exchange occurred:

> Q: …did you talk to Ms. Kirton about the CD?
>
> A: Yes.
>
> Q: Can you tell us about that?
>
> A: She, I asked her why he would – why she would give him the CDs, and she said, I gave it to him for safekeeping.
>
> Q: Do you remember anything else about that?
>
> A: No.
>
> Q: And did you inquire any further, in what she meant by, why is she –
>
> A: No.
>
> Q: --giving one of the younger guys in the shop these nude pictures of herself?
>
> A: No.
>
> Q: Okay.
>
> A: Because her answer didn't make any sense, so -

[143] Mr. Leullier's observation that Ms. Kirton's answer with respect to the CDs did not make any sense was quite correct. I find that Ms. Kirton did provide those CDs to Mr. Walmsley in order to try to entice him to continue a sexual relationship. On a balance of probabilities, I find that she did so after Mr. Walmsley had told her that he was no longer interested in a sexual relationship. Mr. Hoebbe's evidence in part supports this conclusion.

[144] I found that Mr. Hoebbe's evidence was delivered in a straight forward and honest fashion. I found his evidence to be credible in many respects. Mr. Hoebbe had nothing to gain in providing the evidence that he did at the hearing. Mr. Hoebbe was straight forward, although embarrassed in providing some of the evidence he did, which might be expected given the nature of the matters in issue. Still I found Mr. Hoebbe's evidence, such as it was, could generally be relied upon.

[145] Mr. Hoebbe was clear in contradicting Mr. Walmsley and confirmed that Ms. Kirton was the assistant manager, not the manager. More importantly he also had recall of some other disconcerting events.

[146] Mr. Hoebbe confirmed that Mr. Walmsley was good at his job. Mr. Hoebbe also testified that Mr. Walmsley expressed that at one point he did not want to have sexual encounters with Ms. Kirton any longer. He also testified that Ms. Kirton was "miffed" about that.

[147] Then later during questions posed to Mr. Hoebbe by the Complainant, the following evidence was addressed:

> Q: Okay. Shaun, I just want to make sure that, because there was one specific incident that I recall that may – that I believe you were a party to, that you heard, that we were at the back door. You know the back door of the shop?
>
> A: Yeah.
>
> Q: And myself and Ms. Kirton were outside, and it was around that time when I told her I didn't want to continue things, and she said the words, and I hope you can remember this because you were standing on the inside of the door. Don't void me out like the plague, I know where to find you. Do you recall that being said?
>
> A: Yes.

[148] For her part, Ms. Kirton denied having said anything such as that described by Mr. Hoebbe and Mr. Walmsley. Mr. Hoebbe's evidence in that regard corresponded with Mr. Walmsley's, even though it was clear that they had not spoken for a significant period of time and did not "rehearse" their evidence.

[149] Mr. Walmsley had previously testified that Ms. Kirton had provided him a poem and, as mentioned above, certain material suggesting that she had a brain tumour after he had indicated to her that he was no longer interested in any sexual liaisons with her. Ms. Kirton denied having done so, however Mr. Curtis essentially corroborated Mr. Walmsley's evidence.

[150] Mr. Curtis confirmed that he told Mr. Walmsley that Ms. Kirton had left him a present, which included a printout representing the alleged tumour. Mr. Curtis confirmed that Mr. Walmsley was the only one who received that kind of present and that Mr. Walmsley had described it as "weird and gross". According to counsel for the Commission, this was an effort by Ms. Kirton to encourage further sexual encounters.

[151] The evidence I heard satisfied me on a balance of probabilities that following the second sexual encounter, Mr. Walmsley did indicate that he was not interested in having further sexual encounters with Ms. Kirton. I am further satisfied that Ms. Kirton asked Mr. Walmsley not to "void her out like the plague" and told Mr. Walmsley that she knew where to find him.

[152] In light of the evidence that came before me, the demeanor of the various witnesses who testified, and significant issues of credibility for several of the key witnesses, I am not satisfied that Ms. Kirton touched Mr. Walmsley's arm, buttocks, face, or chest after Mr. Walmsley indicated to her in some manner that he was no longer interested in having a sexual relationship with her. In the event that that touching occurred, I am not satisfied as to when it might have occurred. If it occurred prior to Mr. Walmsley's rejection of her advances, Ms. Kirton did not know and could now have known that the touching was unwelcome in light of the sexual relationship that had subsisted, and Mr. Walmsley's earlier interest in pursuing it. Insufficient evidence was put before me to reach any other conclusion. I am also not satisfied that the purpose of the provision of the tumour printouts was to encourage further sexual encounters, as counsel for the Commission speculated.

[153] In balancing the roles of Ms. Kirton and Mr. Walmsley, I am satisfied that for the most part, Mr. Walmsley pursued the relationship and was more aggressive in that pursuit. I am also satisfied that at some point after the consensual sexual relationship began, that Mr. Walmsley indicated he was no longer interested, and at that point, Ms. Kirton became more aggressive in pursuing the relationship and made efforts to continue it notwithstanding Mr. Walmsley's rejection of her advances. The question that

remains is whether that behavior constitutes sexual harassment as defined by *The Human Rights Code.*

Analysis

[154] *The Human Rights Code* prohibits harassment in certain circumstances, as defined by the legislation. Section 19 of the Code reads as follows:

> 19(1) No person who is responsible for an activity or an undertaking to which this Code applies shall
>
> (a) harass any person who is participating in the activity or undertaking; or
>
> (b) knowingly permit, or fail to take reasonable steps to terminate, harassment of one person who is participating in the activity or undertaking by another person who is participating in the activity or undertaking.
>
> 19(2) In this section, "harassment" means
>
> (a) a course of abusive and unwelcome conduct or comment undertaken or made on the basis of any characteristic referred to in subsection 9(2); or
>
> (b) a series of objectionable and unwelcome sexual solicitations or advances; or
>
> (c) a sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person is making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
>
> (d) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance

[155] It is uncontroverted that the Respondents did not directly harass Mr. Walmsley. The Respondents may however be responsible for Ms. Kirton's activities if she is found

to have harassed Mr. Walmsley. Liability may fall against the Respondents pursuant to Section 19(1)(b) of the Code in the event that they knowingly permitted or failed to take reasonable steps to terminate any harassment of Mr. Walmsley.

[156] As set out above, for the most part the sexual activities complained of in the Complaint cannot be said to have been unwelcome. Mr. Walmsley testified that he was intrigued and willingly participated or consented to the sexual activity. I do not find that the consensual sexual activity, the provision of the tumour printout, or any other activity preceding Mr. Walmsley's rejection of Ms. Kirton's advances was proven on a balance of probabilities to have met the definition of harassment under the Code.

[157] The issue therefore becomes whether or not the provision by Ms. Kirton to Mr. Walmsley of two CDs containing explicit pictures of herself, as well as the comments that she made to him after his telling her such advances were unwelcome constitute harassment as defined under the Code. I begin by repeating that I accept on a balance of probabilities that these activities occurred after Mr. Walmsley informed Ms. Kirton that he was no longer interested in a sexual relationship.

[158] Counsel for the Commission provided a number of cases in support of the claim that harassment occurred and in support of the remedies being sought. Those cases (all of which were carefully considered) are listed in the Table of Cases attached at the back of this Decision (in addition to the cases referenced by the Respondents and those I referenced on my own).

[159] In not one of those cases where harassment was found to have occurred, did the Complainant willingly participate and consent to sexual activity. While it may be that

such cases exist, they were not provided to me. Additionally, none of the cases provided by counsel for the Commission involved credibility and reliability problems on behalf of the Complainant to the extent present here. In each of these cases, the Complainant clearly objected from the outset to the course of sexual harassment to which they were subjected.

[160] As one example, in Janzen v. Platy Enterprises Ltd. [1989 1SCR 1252], the Supreme Court of Canada found that the Complainant clearly and repeatedly objected to the harassing behavior of the Respondents' staff member. That case also revealed that there was a pattern of uncooperative and threatening behavior caused by this staff person to the Complainant following the employee's rejection of the harassing behavior.

[161] Although the Commission and the Complainant attempted to demonstrate that there were reprisals by virtue of Mr. Walmsley having to do excessive cleaning, I do not find that the Commission or the Complainant proved on a balance of probabilities that any such pattern of behavior occurred here. None of the other employees who provided evidence satisfied me that Mr. Walmsley's evidence that he was compelled to undertake any activities by way of reprisal or suffered other forms of reprisal related to harassment.

[162] Mr. Curtis testified that Mr. Walmsley was told to do certain cleaning work that all of the other staff members had to do, but that he was compelled to do that on a more frequent basis as a result of his failure to complete his other tasks appropriately. Mr. Hoebbe did not provide any reliable evidence supporting the notion that Mr. Walmsley suffered any reprisals either.

[163] Although his evidence was that Ms. Kirton was moody from time to time, Mr. Hoebbe's evidence supported the contention that she was not uncommonly moody and not just with Mr. Walmsley. The evidence of Mr. Leullier did not support the contention that there were any reprisals either.

[164] Ms. Kirton's evidence and that of Mr. Curtis supported the notion that Mr. Walmsley sometimes did not return to work after lunch. It also supported the contention that other employees complained about Mr. Walmsley's lack of work ethic. While I need not make any in depth comment with respect to that contention, I can say that given Mr. Walmsley's credibility and reliability issues, evidence of drug use, having sex during work hours, the fact that cleaning is generally required, and that other accommodations were made for Mr. Walmsley, I cannot find on a balance of probabilities that any reprisals occurred.

[165] If the Complainant and the Commission wished me to accept that Mr. Walmsley's failure to attend work or leaving early were the result of harassment and a form of breakdown caused by harassment, they ought to have called corroborative evidence to support that contention. I was told that in part these issues were discussed in counseling but the counselors and doctors who would have been available to provide that evidence were not called. No explanation was provided for the failure to call that evidence.

[166] The Complainant and the Commission tendered no expert report to support their theory. Given the Complainant's significant credibility and reliability issues in the unique circumstances of this case, and given the Complainant's history of erratic negative

behavior and drug use (among other things) at that time, I cannot simply accept on a balance of probabilities the argument that there was a link between the alleged harassment and Mr. Walmsley's absences. While Mr. Hoebbe testified that Mr. Walmsley was a good worker and liked his job, I take that to refer to the times Mr. Walmsley was present and not as corroboration of anything else.

[167] Given the findings I have made in this matter, as referenced above, the only conduct that might meet the definition of harassment, was the provision of the CDs and Ms. Kirton's comments in terms of not "voiding her out like the plague" and "knowing where to find" Mr. Walmsley. Although the evidence revealed that Ms. Kirton did call Mr. Walmsley to advise that she thought she was pregnant, I do not find that that constitutes harassment in the circumstances of this case. Similarly, I do not find that Ms. Kirton's efforts to call Mr. Walmsley to come into work constituted harassment. All of the employee witnesses testified that that was a part of Ms. Kirton's employment duties.

[168] The Respondents argued that the provision of the CDs to Mr. Walmsley did not constitute sexual harassment. They argued that there is nothing on the face of the CDs that indicates what pictures are embedded therein. The Respondents submitted that Mr. Walmsley had to take the additional step of opening up the CDs in order to look at them. Accordingly, the Respondents asserted that Mr. Walmsley was a willing participant in viewing those pictures such that there was no unwelcome conduct.

[169] With respect, I cannot agree with the Respondents submissions. Once Ms. Kirton knew that Mr. Walmsley was not interested, it was simply inappropriate and a

breach of the Code for her to be handing CDs over to Mr. Walmsley of the nature and kind that she did. Ms. Kirton's explanation for why she kept those CDs at work was not credible. Ms. Kirton knew full well what it was that she was doing and why she was doing it. The purpose was inappropriate and constituted a breach of the harassment provisions of *The Human Rights Code.* To assign responsibility to the subject of the harassment for opening the CDs is inappropriate and akin to victim blaming that runs contrary to the purposes of the Code.

[170] In the circumstances of this case, the question of whether Ms. Kirton's conduct following Mr. Walmsley's rejection of her advances (after initially consenting) was unwelcome, must be approached carefully and be understood in a contextual fashion. At the same time, I wish to be clear that in dealing with sexual harassment cases under the Code, 'No' must be taken to mean 'No'. The difficulty here, beyond Mr. Walmsley's initial intrigue and consent, is Mr. Walmsley's admitted credibility and reliability problems.

[171] In determining whether or not Ms. Kirton's provision of the CDs and comments to Mr. Walmsley constituted unwelcome or unwanted sexual solicitations or advances using a contextual analysis and considering all of the evidence, I conclude that Ms. Kirton did engage in a series of unwelcome sexual solicitations or advances. Mr. Hoebbe's evidence confirmed Mr. Walmsley's evidence in that regard. Ms. Kirton knew or ought to have known that those advances were unwelcome. Both she and the Respondents knew or ought to have known that her conduct could create a poisoned environment that is unacceptable and which I find breached the Code.

[172] In the circumstances, I find that Ms. Kirton did sexually harass Mr. Walmsley. I further find that the Respondents, being persons responsible for the activity or undertaking, failed to take reasonable steps to terminate the harassment.

[173] Mr. Leullier's evidence with respect to the matters in issue supports this latter finding. While many employers might not have kept Mr. Walmsley employed once it was made clear that he had used crack cocaine in the work place, Mr. Leullier elected to give Mr. Walmsley more chances. Whether he did so because employees were hard to find, or because Mr. Walmsley was a good employee, or perhaps out of kindness, is of no moment. The fact is that he did permit Mr. Walmsley to attend at what he understood to be a drug rehabilitation program, kept his job for him, and did not terminate his employment.

[174] Notwithstanding that generous effort on behalf of the Respondents, Mr. Leullier's evidence revealed that once the Respondents found out about the ongoing harassment, the Respondents did not behave appropriately.

[175] In cross-examination, the following exchange occurred:

> Q: Well, you told us that Jason told you when he met with you about these CDs, is that right?
>
> A: I believe that he told me about the CDs when he came to complain about him and Hez.
>
> Q: Okay.
>
> A: And he did not want to be working with her anymore, okay?
>
> Q: Okay. Was that –

> A: My reply to that was that I would transfer him to another store. He didn't think that was fair. I agree, but I was not going to throw out an assistant manager and start training another person all over again.
>
> I did what I thought was the best by offering him a transfer to a store which was fairly close, and put an end to his – what problem at the time, and still keep him employed in the company.

[176] Later in cross-examination, the following exchange occurred:

> Q: Tell me more about that conversation, if you can recall the details?
>
> A: The main things I remember out of that meeting was him complaining about Hez and just, I guess describing the situation, and me offering him a transfer, and him refusing that transfer. He did complain, he said it's not fair, I agree with that, but that was the best thing I could do at the time.
>
> Q: Okay.
>
> The Adjudicator: When you say you agree with that, you mean you agree it wasn't fair, or do you mean something else?
>
> The Witness: Well, I guess I agree that maybe it wasn't fair to transfer him, but my job was to take care of that business and do the right thing for the business, which involved moving him to another store, he keeps his job, they're both separated, I keep my assistant manager.

[177] While there were discrepancies between Mr. Walmsley's evidence and that of Mr. Leullier in terms of whether the meeting was by phone or person, nothing particularly turns on that. It is reasonable to expect that after 4.5 years, memories might be faded in that respect.

[178] In addition, under cross-examination, the following evidence emerged:

> Q: But were you left with the impression that Jason did not like how she was acting towards him?

A: My impression was, that I remember, is that they did not – he did not want to be working with her at any point, from that point on.

[179] Later:

Q: So he told you he didn't want to work alongside her?

A: That's right.

[180] Subsequently, in response to questions from Mr. Brousseau, the following exchange occurred:

Q: The question was presented to you, John, by Mrs. Khan, that an alternative to moving Mr. Walmsley to the McPhillips store might have been that you transfer two or three other employees in such a fashion as to make room at McPhillips so that you would be permitted, so that you could in fact transfer Ms. Kirton, so that in fact Mr. Walmsley could then stay on –

A: At Regent.

Q: - on Regent. And I'm not –

The Adjudicator: So what's the question?

By Mr. Brousseau:
Q: Did you think that that was reasonable?

A: Given enough time and what not, all that's possible, but it demanded a more immediate action, and I used my discretion at that point transferring him.

[181] Ultimately Mr. Leullier testified that he believed Mr. Walmsley in his description of being harassed by Ms. Kirton at work. In cross-examination of Mr. Leullier, the following exchange occurred:

Q: Sir, did you believe Jason when he told you that, when he described what was happening to him at work? Did you believe him?

> A: After – well, during that meeting, I mean, it took me by surprise, but he was sincere about it, you know. I, yes, I believed him.

[182] In light of the fact that Mr. Leullier believed Mr. Walmsley, his response and that of the corporate Respondents was entirely inadequate. The notion of moving the victim of harassment, as opposed to removing the harasser or taking other steps to ameliorate the situation, falls short of what is required in such circumstances.

[183] Of all of the possible steps that the Respondents could have taken, the one they proposed to take was inappropriate. As was suggested in cross-examination, the Respondents could have moved Ms. Kirton to another one of their outlets. The Respondents could have put Ms. Kirton on leave with pay pending an investigation. The Respondents could have ensured that Ms. Kirton was not present during Mr. Walmsley's shifts. The Respondents could have explored appropriate possible responses to the harassment with the appropriate authorities which might have included closer supervision and education of staff respecting harassment policies. All of these possible responses (which are not intended to be an exhaustive list) would have been in the long-term interests of the Respondents themselves, in addition to Mr. Walmsley.

[184] The Respondents however determined to follow a more short-sighted path in this instance. While unquestionably Mr. Walmsley was at the time far from an ideal employee and provided several possible grounds of warning and possible discipline or dismissal, the sexual harassment he endured was not one of them. Mr. Walmsley's use of marijuana on site during work hours might well have been such a ground. His use of crack cocaine on site might have been another. Mr. Walmsley having sex on site either during work hours or otherwise, might have been yet another.

[185] Still, Mr. Walmsley was not disciplined for these actions. Despite being a somewhat difficult employee in all of the foregoing respects, and despite being an individual who described himself as a person whose name was not synonymous with truth, the Respondents ought not to have only made anemic and inappropriate efforts to address the harassment.

[186] There was much evidence adduced with respect to whether Mr. Walmsley quit once he was offered his transfer, or whether he was essentially terminated. In light of my decision, the determination of that matter is not critical. That said, I find on a balance of probabilities that it is unlikely that Mr. Walmsley actually quit. I find that in the circumstances of this case, the proposed transfer for the convenience of the Respondents of the individual who suffered the harassment would constitute constructive dismissal, rather than a resignation. Accordingly the Respondents' arguments that Mr. Walmsley quit cannot be sustained.

[187] In light of my findings that Mr. Walmsley was harassed as defined by the Code, and that Mr. Walmsley's employer knowingly permitted or failed to take reasonable steps to terminate the harassment, the final question then becomes: What is the appropriate remedy in all of the circumstances of this case?

Remedy

[188] Before examining the issue of remedy, I pause to note that Section 43(1) requires the adjudicator to decide:

> …whether or not, on a balance of probabilities, any party to the adjudication has directly or indirectly contravened this Code **in the manner alleged in the Complaint**. (emphasis added)

[189] Earlier in these Reasons, I touched on the fact that the Complaint included various allegations, many of which I found to be unsupported by the evidence or outright falsehoods. The question thus arises as to whether the phrase "…in the manner alleged in the Complaint" requires the Complainant and the Commission to prove all aspects of the Complaint including the factual allegations on a balance of probabilities.

[190] In my view, Section 43 refers not to each and every alleged fact, but rather the type of breach of the Code that is being alleged. In the instant case, the allegation that Ms. Kirton provided two CDs with explicit pictures so that Mr. Walmsley could "think about it some more" after he had indicated he no longer wished to be involved in such activities and her related comments constitute sexual harassment.

[191] Accordingly, while not all of the facts in the Complaint have been proven, I am able to find that the Respondents directly or indirectly contravened the Code as described in at least one paragraph in the Complaint. The same may be said in respect of the offending comments made by Ms. Kirton. I will have more to say about the form of Complaint and the role of the Commission later in this Decision.

[192] Once a breach of the Code has been found, a number of remedial orders are available to the adjudicator. Section 43(2) addresses the possible remedial orders available. Section 43(2) of the Code reads as follows:

> Where, under subsection (1), the adjudicator decides that a party to the adjudication has contravened this Code, the adjudicator may order the party to do one or more of the following:

> (a) do or refrain from doing anything in order to secure compliance with this Code, to rectify any circumstance caused by the contravention, or to make just amends for the contravention;
>
> (b) compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate;
>
> (c) pay any party adversely affected by the contravention damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings, or self-respect;
>
> (d) pay any party adversely affected by the contravention a penalty or exemplary damages in such amount, subject to subsection (3), as the adjudicator considers just and appropriate as punishment for any malice or recklessness involved in the contravention;
>
> (e) adopt and implement an affirmative action program or other special program of the type referred to in clause 11(b), if the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening this Code.

[193] The intention of the legislation is to confer on the adjudicator a wide discretion to determine a remedy that is just and appropriate in all of the circumstances of the case, bearing in mind the purpose of the Code as a whole. The legislation does not mandate compensation for any and all financial losses sustained, expenses incurred, or benefits lost by reason of the contravention. Rather, the Code directs that the adjudicator must find that any such compensation must be just and appropriate. The same mandate, to do what is just and appropriate, applies with respect to determining general damages, if any, for injury to dignity, feelings of self-respect, and any penalty or exemplary damages.

[194] In closing argument, the counsel for the Commission and the Complainant both advised that damages of $9,000 for loss of dignity or self-respect were sought (as was

the case in Garland v. Tackaberry (Grape & Grain) [2013] MHRBAD No 105, 2013 MHRB 5 [2013] CLLC 2013 Carswell Man 435). In addition, lost wages were sought from November 3, 2009 to November 17, 2009, or 12 days at $9 per hour based upon a 37.5 hour week (or 7.5 hours per day). By my calculations, this totals $810. In addition, a further 9 days of lost wages were sought for the period Mr. Walmsley was in the Crisis Stabilization Unit (or $607.50). It was suggested to me that this would put Mr. Walmsley back in the position he would have been in but for the harassment.

[195] Both the Complainant and counsel for the Commission advised that it was Mr. Walmsley's position that there should be a set-off against that amount for any costs that the Respondents incurred due to the window that was broken by the Complainant. Counsel for the Commission also argued in favour of certain "public interest" remedies including the creation of anti-harassment policies within three months of my decision and mandatory education, including for managers, Ms. Kirton, and other employees inter alia. The Complainant supported those remedies.

[196] For their part, the Respondents argued that the entirety of the Complaint should be dismissed and that costs ought to be ordered against the Commission in the amount of $25,000. The Respondents argued that the Commission was guilty of fraud in pursing this matter and it knew or ought to have known that the Complaint was false. Although the Respondents were cautioned as to possible repercussions of alleging fraud where no such finding is made, the Respondents persisted in the allegation.

[197] During the course of their closing argument, there was finally some discussion as to amendment of the Complaint. Counsel for the Commission submitted that I should

consider amending the Complaint to correct some of the misrepresentations contained therein. For its part, the Respondents submitted that they were fine with the amendment of the Complaint as requested by counsel for the Commission provided that the matter would then be adjourned and a new hearing set to determine the matters as contained in the new Complaint. The Complainant did not really take any position other than to rely upon counsel for the Commission.

[198] I considered several cases in deciding whether or not to allow an amendment, which might have resulted in an adjournment. It is obvious, or should be obvious, that it would neither be just nor appropriate to amend the Complaint in the manner suggested at this late stage, especially were that to result in an adjournment of the matter and a requirement to have a further hearing. As set out above, at the commencement of the hearing, the Respondents complained as to the length of time it took to have this matter come to adjudication. For the Respondents then to argue that the matter ought to be adjourned and a new hearing set makes little sense. Neither is it consistent with the remedial actions that ought to have taken place by now in the Respondents' place of employment.

[199] Given the circumstances of this case, the Complainant and the Commission ought to be compelled to rely upon the nature and style of the Complaint as it exists. I did not see that there would be sufficient prejudice in proceeding to warrant an amendment and an adjournment. Although I did not find that most of the factorial underpinnings of the Complaint were proven, the Complaint does reveal the nature of the issue i.e. an alleged breach of the Code due to harassment (Section 19).

[200] Accordingly, and given the pre-hearing conference that was held, in my view fairness was not compromised by proceeding. Little or nothing would be gained by an adjournment, rather much would be lost. In my view, the fairest determination of the matter required that the matter proceed based upon the Complaint as it currently stands.

[201] With respect, neither party's position in terms of remedy is fully warranted in the circumstances of this case. As for the fraud allegation, I find it is wholly unfounded. The Commission has a job to do in dealing with these matters. The Respondents' allegations in that respect are totally inappropriate. There was no evidence of any fraud whatsoever. The Respondents ought not to have made that offensive allegation.

[202] I believe that the Respondents' allegation however was not based in malice but rather was based in their real frustration respecting the falsehoods contained in the Complaint, the damage the Complainant caused them, the lack of restitution therefrom, and the failure to amend the Complaint much earlier on to ensure that it bore at least a closer resemblance to reality when both the Complainant and the Commission knew or ought to have known some time ago of the glaring misrepresentations contained therein.

[203] Many of the critical elements of the Complainant's Complaint were admitted by him to be false. The evidence before me showed that the Complainant engaged in a series of misrepresentations and untruths in his Complaint and in the period that followed. The Complainant acted with blatant disregard of the property rights of the Respondents. While the 2012 incidents do not form part of my decision, the Code does

require me to consider what would constitute a just and appropriate remedy in all of the circumstances of the case.

Lost Wages

[204] As set out above, Mr. Walmsley might have easily have been warned, disciplined, and/or dismissed for one of his multiple infractions. In the unique circumstances of this case, I was not satisfied on a balance of probabilities that Mr. Walmsley suffered lost wages as a result of the breach of the Code, or that if he did, it would be just and appropriate to award him lost wages.

[205] I was not satisfied that Mr. Walmsley missed any work due to the receipt of the CDs or the comments made to him. In other words there was no nexus proven between the harassment and the loss of employment. While in most cases I expect that the nexus between the harassing conduct and the lost employment and resulting lost income would be obvious, in this case, given Mr. Walmsley's credibility problems, his drug problems at the time, his other psychological and medical issues, and his previous consent to more pronounced and explicit sexual activities, I cannot simply assume that such a nexus exists. Mr. Walmsley may well have missed work for a wide variety of reasons unrelated to the harassment.

[206] It is incumbent upon the Complainant and the Commission to satisfy me on a balance of probabilities that Mr. Walmsley suffered financial losses or incurred expenses or lost benefits by reason of the contravention. While I have found that there was a contravention of the Code, I have not been persuaded that Mr. Walmsley suffered

any financial losses or incurred any expenses or lost any benefits by reason of that contravention.

[207] As aforementioned, both the Complainant and counsel for the Commission had the opportunity to advance medical or psychological evidence, showing that he was unable to work because of the contravention. For example, they could have brought evidence to show that the time Mr. Walmsley spent in the Crisis Stabilization Unit was related to what was happening to him at work. They either chose not to or no such evidence exists. I cannot infer that because Mr. Walmsley's time in the Crisis Stabilization Unit was reasonably proximate to Ms. Kirton's actions, that there is a causal connection present. In the unique circumstances of this case, I cannot assume a nexus where there was no convincing, corroborative evidence put before me to tie the limited harassment that I found occurred with any financial losses.

[208] Mr. Walmsley could have been let go or not attended at work for any number of reasons. His previous and subsequent jobs were all of short duration. Further, given the downward spiral he was then on, I cannot conclude that Ms. Kirton's actions in providing the CDs and making the comments she did caused him to miss any work. It is just as likely that his drug use at the time or other issues led to his missed time at work. Further, the requirement that any award be just and appropriate precludes a payment to Mr. Walmsley given his conduct and the purpose of the legislation.

[209] To the extent that Mr. Walmsley deceived the Respondents (and I take it the Commission) in his Complaint, he did not afford the Respondents an opportunity to settle this matter in a timely manner or to take remedial steps of its own accord. Rather

than do so, Mr. Walmsley's deceit created or contributed to circumstances that led the Respondents down a path of litigation focused on proving what they knew to be true, namely that the Complainant was not telling the truth in the Complaint. While that neither absolves the Respondents of their responsibilities under the Code, nor negates the breach of the Code caused by virtue of Ms. Kirton's sexual harassment, it cannot lead to a conclusion that it would be just or appropriate to compensate Mr. Walmsley for financial losses sustained, expenses incurred, or benefits lost by reason of the contravention, none of which have been proven on a balance or probabilities.

[210] If I am wrong in that I would have only found liability for the November 3, 2009 to November 17, 2009 period or $810, which is more than offset against the cost of the window he broke. I would have, as counsel for the Commission and the Complainant submitted, ordered such an offset in the circumstances of this case.

Damages for Injury to Dignity, Feelings, or Self-Respect

[211] The issue of general damages for injury to dignity, feelings, or self-respect is somewhat more complicated in this case. There is one acknowledgement in the case law that inherent in sexual harassment cases is the reality of loss of dignity and feelings of self-respect, that merit compensation. That said, none of the Complainants in those cases had the credibility problems, demeanor, and history that was present here.

[212] Mr. Walmsley's evidence was that he consented to significant sexual contact with Ms. Kirton. The nature and type of the sexual activity described and its environment are such that in that context, the provision of the CDs and the comments made by Ms. Kirton fall at the lower end of the spectrum in terms of harassment.

[213] Mr. Walmsley's evidence and his parents' evidence was that, at the time he was, to say the least, a difficult individual. His evidence included the fact that he was charged with uttering threats against one or both of his parents in January 2010. His behavior while on drugs, which he testified was the case during the course of his employment, was by his own admission and the evidence of his parents, violent, aggressive, and, in a word, atrocious.

[214] Still there ought to be an award under this head of relief, it should balance the facts as set out herein with the recognition of the inherent value of the right to be free of any harassment and victimization. It is therefore appropriate to use some objectivity in evaluating the circumstances surrounding the violation of the Code (Seguin v. Great Blue Heron Charity Casino, 2009 HRTO 940 CanLII, 2009 HRTO 940 and Demars v. Brampton Youth Hockey Association, 2011 HRTO 2032 CanLII).

[215] It has been held that the quantum of damages for this loss ought not be set low. The reason for that is to ensure that the social importance of the Code is not trivialized by creating a "license fee to discriminate" (Demars v. Brampton Youth Hockey Association supra and ADGA Group Consultants Inc. v. Lane 2008 CanLII 39605 (ON SCDC), (2008) 295 D.L.R. (4th) 425, 2008 CanLII 39605 (Ont. Sup. Ct.).

[216] It has also been held that a general evaluation of the circumstances of the violation and its effects should be undertaken to determine an appropriate remedy under this head of relief (Arunachalam v. Best Buy Canada, 2010 HRTO 1880 (CanLII), 2010 HRTO 1880). Among other factors, the case law directs that I should consider the seriousness of the offensive treatment, the context of that treatment, the degree of

vulnerability or non-vulnerability of the Complainant, evidence of hurt feelings, humiliation, and the loss of self-respect, dignity, and confidence, and the type and extent of victimization, among other factors.

[217] It has been held that the loss sustained due to injury to dignity, feelings, and self-respect is generally more serious depending objectively upon what occurred and the context. For example, a long term employment situation may result in greater injury. The more prolonged, hurtful, serious, and unwanted the offensive conduct is, the greater the injury to dignity, feelings, and self-respect (Arunachalam v. Best Buy Canada supra). Where it can be shown that particular emotional difficulties resulted from the offensive conduct, the higher the award might be for the loss suffered (Sanford v. Koop, 2005 HRTO 53 (CanLII), 2005 HRTO 53 (CanLII)).

[218] Given all of the facts and the aforementioned factors, any award for injury to dignity, feelings, or self-respect in this case would be at the low end of the scale. Accordingly, I award Mr. Walmsley $3,500 under this head of relief. That amount, however, shall be off-set against other amounts that I find Mr. Walmsley owes the Respondents, as shall be set out more fully below.

[219] I do not find that any amount of compensation for exemplary damages would be just and appropriate in the circumstances of this case. I do not find that given the circumstances there was any malice or recklessness involved in the contravention on behalf of the corporate Respondents.

[220] While I find that the Respondents' reaction to the Complaint was aggressive, I find that that was largely caused by virtue of the fact that the Complaint contained so

many untruths, and in that respect, their reaction was somewhat understandable. While it would have behooved the Respondents to take a less aggressive stance with the Commission, I cannot ignore the substantive, blatant, and vexing falsehoods in the Complainant's Complaint and the problems in his evidence at the hearing. Had the Complainant told the truth, perhaps this matter could have been settled as opposed to litigated for one week.

[221] The Commission's failure to seek to amend their Complaint on a timely basis is also puzzling. The Commission knew or ought to have known that certain aspects of the Complaint were untrue. Certainly at the time the Commission filed its Brief, it knew that some key elements of the Complaint were false. The fact is that the Complaint form involves a certification that the information is correct. This certification must have meaning.

[222] Attending at an adjudication knowing that substantial portions of the Complaint are false is troubling for a number of reasons. The Commission will need to ensure going forward that attention is paid to the contents of a Complaint. To the extent that a prescribed form requires a certification by the Complainant as to the correctness of the Complaint, it is incumbent upon both the Complainant and the Commission to ensure that on a balance of probabilities it is not based on falsehoods, sophistry, and untruths. To proceed otherwise, is to take some significant risks, both in terms of the high respect in which the Commission ought to be held and in terms of costs.

[223] While I do not find that the Commission ought to be liable for costs in this case, Section 45(2) of the Code permits the adjudicator to order costs where the adjudicator

regards a Complaint or Reply as frivolous or vexatious, or is satisfied that the investigation or adjudication has been frivolously or vexatiously prolonged by the conduct of any party. The costs range from a fixed sum to full indemnification of the costs of any party affected by such frivolous or vexatious actions. While I did not order costs against the Commission in this case, I do find that the Complainant himself is liable for some costs to the Respondents.

[224] I find that the Complainant's actions in misrepresenting his Complaint and in providing untruthful statements throughout the process equate to frivolous or vexatious prolongation and should attract costs. The costs I would order are in the minimal amount of $3,500 to be offset against the damages I awarded for injury to dignity, feelings, or self-respect.

[225] In determining the amount of costs, I have considered the fact of Mr. Walmsley's current financial circumstances. I have also considered the overall justice, fairness, and appropriateness of such an award. I have further considered that knowingly misrepresenting the facts in a certified Complaint should attract an award of costs in this quasi-judicial proceeding, all things being equal. Had Mr. Walmsley been a man of greater financial means or entitled to a larger recovery, I would have ordered far greater costs to be offset against any financial award Mr. Walmsley would have otherwise received, as his actions in misrepresenting the truth and otherwise causing unnecessary delay and prolonging the hearing without just cause warrant such an award.

[226] I do find that it is critical that the Respondents adopt and implement an appropriate policy dealing with harassment generally, and sexual harassment in

particular, and make an Order accordingly. None of the Respondents' employees who testified before me exhibited any understanding of the issue. Most were unaware of any policy against harassment despite the time that has passed since the incidents giving rise to this Complaint. This is simply unacceptable in the circumstances.

[227] The policy will need to be written and approved by The Human Rights Commission within three months of the issuance of these Reasons. The policy will need to be delivered orally and in writing to each of the Respondents' employees throughout their system within six months of the delivery of these Reasons. The Respondents will be required to invite their employees to sign a document acknowledging that they have received the policy and had it explained to them. Confirmation of that process and its completion is to be provided to the Commission within six months of delivery of this decision. The anti-sexual harassment policy will need to be posted in a place that is available and visible to all of the employees at each one of the Respondents' outlets. Part of the policy will need to ensure that there is an appropriate individual designated by the Respondents to deal with harassment complaints.

[228] Provided Ms. Kirton continues to be employed by the Respondents, she will be required to attend an educational seminar dealing with harassment in the workplace, as will all the managers, assistant managers, and executives employed by the Respondents, including the President of the corporate Respondents. Appropriate confirmation of their completion of the course will be required to be provided through the Commission as well. Within three months of delivery of this Decision, the Respondents will provide the Commission with proof of enrollment in such a course.

Conclusion

[229] In conclusion, I believe it is worthwhile to make several additional comments. The Complainant testified in his closing argument that he has changed. He advised me that he now is honest, is engaged in re-training, and is trying to rebuild his life and his relationships with his family. In all of that process, and no doubt it is and will be a process, he is to be commended and encouraged.

[230] The Complaint before me was filed approximately 4.5 years ago respecting matters that occurred almost five years ago. These Reasons are based upon the record before me and should not derail the very worthwhile process in which the Complainant advised me he is now engaged, and which I hope and believe he is capable of successfully completing.

[231] In terms of the Respondents, as they proceed through the remedial steps ordered, should they maintain the same level of generosity of spirit shown in trying to work with and accommodate the multitude of problems they no doubt have encountered historically among some of their staff, they will no doubt discover a better, more efficient, and appropriate working environment has been created. Despite the difficulties inherent in the Complainant's time with them as they see it, the Respondents should view this Order not as punitive, but as a remedial opportunity to improve their working conditions with all the benefits that will no doubt ensue to them as a result.

[232] I will retain jurisdiction to deal with the matter, should there be any questions, concerns, or issues involving implementation.