HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Dianne Ford

Applicant

-and-

**Nipissing University, Dennis Mock,
Connie Vander Wall, and Vicky Paine-Mantha**

Respondents

DECISION

Adjudicator: David Shannon

Date: January 28, 2011

File Number: TR-0058-09

Citation : 2011 HRTO 204

Indexed as: **Ford v. Nipissing University**

APPEARANCES

Dianne Ford, Applicant	)	Kenneth A. Krupat, Counsel
Nipissing University, Dennis Mock, Connie Vander Wall and Vicky Paine-Mantha, Respondents	)	Catherine L. Peters, Counsel

[1] This is an Application made under s. 53(5) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code"*), dated January 19, 2009. The underlying complaint was filed with the Ontario Human Rights Commission (the "Commission") on October 18, 2006.

[2] The applicant alleges she experienced discrimination and harassment in employment on the basis of sex contrary to sections 5(1), 5(2) and 7(2) of the *Code*. She was an Assistant Professor at the respondent University at the time of the events in dispute.

Issues

[3] Based on the law, the central questions for consideration are as follows

a. Did the applicant experience discrimination and harassment in her employment on the basis of sex contrary to ss. 5(1), 5(2) and 7(2) of the *Code*?

b. Did the management of the respondent react and investigate the harassment appropriately?

The Law, Facts and Background

[4] On March 31, 2006, the applicant received an email from a user named Dianne's Stalker. The email was sent from an account identified as dianneslover@hotmail.com". The subject line read "Hey Babe". The email was extremely offensive and threatening and it is not necessary to repeat its contents in my Decision.

[5] At the time the applicant was over seven months pregnant. The applicant indicated that she felt anger at the student whom she assumed had sent the threatening email. She was also embarrassed that, although necessary, this private information was shared among colleagues. She also felt fear that she could not get away if assaulted and concern for her unborn child if that happened.

[6] The applicant's husband forwarded the offensive message to several members of the senior administration at the respondent University. Specifically, they were Dr.

Vanderlee, Ms. Paine-Mantha and Dr. Chase, with copies to Ms. Vander Wall and himself. Arrangements were then made for the applicant and her husband to meet with Campus Security on the following Monday. The applicant was also embarrassed that, although necessary, this private information was shared among colleagues

[7] Later the same evening, the applicant wrote a further email to representatives of the respondent University. In that note she indicated that she had an idea of who the sender was, and that she did not believe the sender was in her first class on Monday.

[8] Dr. Chase, Vice President Academics and Research, replied on behalf of the University the next day, Saturday, sending his response to all of the other individuals who received the original message from the applicant's husband, and copying Ms. Vander Wall and Dr. Jones. In his message to the applicant, Dr. Chase stated that he did not feel that any sender who identified themselves as a "stalker" should be ignored. He noted that "this incident is extremely serious and needs to be treated as such". He offered to attend class on Monday morning, and noted "if you have a specific request regarding that first class, please let me/us know and we will take the necessary steps to ensure that you feel safe." Dr. Chase also encouraged the applicant to identify the person she suspected of sending the email.

[9] The applicant's husband responded to Dr. Chase's email the same day. He suggested that campus security accompany the applicant to her class on Monday morning. He also suggested that the police should be contacted on Monday morning.

[10] The next communication was from the applicant, who emailed that she appreciated the support she had received. She said she would "welcome security during [her] classes (particularly the Tuesday/Thursday class next week)". She also reported on a conversation with her husband's brother, a police detective, who had advised that he felt the matter should be reported to the police.

[11] The applicant concluded her email with the following comments:

> Again, thanks for the support, and let's arrange for security to accompany me to class for the last week. We can discuss steps regarding approaching the suspected student- something I personally will not do, but security or police may want to.

[12] Upon receipt of the applicant's email, Dr. Chase emailed Ms. Paine-Mantha and Ms. Vander Wall to inquire about the appropriateness of having a security officer attend class with the applicant and/or remain present during the class. With respect to the latter suggestion, he expressed concern about the "(possibly disturbing) impact [of] the presence of security in a class ... on that class". He also inquired about whether steps should be taken to protect the applicant outside class. Finally, Dr. Chase proposed that arrangements be made for the applicant's 8:30 a.m. class on Monday and that they could "then figure out what to do from there".

[13] Dr. Chase emailed the applicant on Saturday, April 1, 2006, and advised her that she would hear from someone before Monday morning about security arrangements. He concluded his message by stating, 'in the meantime, I hope you're doing OK." The applicant responded by email, stating "Thanks Ted! Sounds good, Dianne."

[14] On Sunday, April 2, 2006, Ms. Paine-Mantha contacted Security Services and spoke with Officer Peter Masse. She advised him that the applicant had received a "threatening email from a student referring to themselves as a STALKER", and that the applicant "has an idea who is responsible for the email and it is making her very uncomfortable". Officer Masse advised Ms. Paine-Mantha to have the applicant come to Security Services as soon as she arrived on Monday morning and Security Services would decide what action to take at that time. Ms. Paine-Mantha arranged for Dr. Chase to drop off a copy of the offensive email to Security Services.

[15] After speaking to Officer Masse, Ms. Paine-Mantha telephoned the applicant at home to advise her that she should report to Security Services at 8:00 a.m. on Monday morning. The applicant had mentioned that she had received an earlier email from a

student who used the term “hey babe”. Ms. Paine-Mantha also encouraged the applicant to look for that earlier email message and, if she located it, to bring it with her to the Monday morning meeting.

[16] The respondent University had a Personal Harassment Discrimination Policy in place at the time. It states “The Board of Governors of Nipissing University endorses the principle that all members of the University community have the right to study and work in environment free from harassment.” This Policy creates a complaint procedure in the event of sexual harassment within the University community. However, in order to trigger these procedures, the Policy requires that there be an identifiable respondent. In the matter at hand, due to the fact that the author of the offensive email could not be found, a complaint could not be launched. I note that this was the evidence of the respondent, notwithstanding the fact that in the Policy Principles at section 6(C) it states that the remedies provided under the policy are intended “to prevent acts of personal harassment or discrimination”. This will be discussed more fully later.

Meeting with Security Services

[17] As arranged, a meeting was held on Monday morning prior to the applicant`s first class to discuss security issues arising from the offensive email. The applicant and her husband, Dr. Jones, attended the meeting along with Ms. Paine-Mantha, Dr. Vanderlee, and two representatives from Campus Security Services, Mr. Cotie and Richard Guy.

[18] During the meeting, Security Services advised the applicant that they could not provide a uniform officer to sit in on her classes for two reasons. First, the presence of a uniformed security officer in the classroom was considered inadvisable, as it could be disturbing to the students in the class. Second, Security Services did not have sufficient staffing to make an officer immediately available for this purpose. When the applicant requested a plainclothes officer, they also indicated that they did not have staffing to provide one to sit in on class or escort the applicant to her class. In his evidence, Mr. Cotie indicated that the budget would not allow for a plainclothes officer and it was against policy to be out of uniform.

[19] The respondent University has approximately 4,800 students. Evidence provided by the respondent University indicated that its annual budget is $40,000,000.00. There were eight staff members available to Security Services, and two guards on shift that Monday morning.

[20] The applicant declined the offer from Security Services to provide a security escort to and from her classes, and proceeded to class with her husband. She also declined Dean Vanderlee's offer to sit in on her classes because she felt his presence as a member of University administration would be disruptive, and the principal concern for safety would be between classes. The applicant indicated that she felt the professional obligation to continue with her April work responsibilities.

[21] Security Services provided the applicant with a business card which included their phone number so that she could call if she encountered any security issues. Human Resources later also offered a cell phone and a personal alarm. Security Services had also contacted the North Bay police, and provided the applicant with contact information for the police.

[22] The applicant indicated that the Security Services personnel she spoke to at the Monday meeting said to her, "If it makes you feel any better, this isn't the worst case we've seen." This comment made her feel "belittled as though I shouldn't be concerned about my safety and the safety of my unborn child in the case of an assault".

[23] Mr. Guy in his evidence could not recall using these words when Security Services representatives spoke to the applicant, and speculated that she may have misunderstood their attempts to reassure her about the degree of the security risk as an attempt to downplay her concerns. Certainly, Security Services personnel also indicated that they believed at the time that the applicant did not require further assistance.

[24] In determining the credibility of witnesses, the Tribunal has made use of the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.):

> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize is reasonable in that place and in those conditions…

[25] I find that the representative of Security Services did attempt to console the applicant at a stressful time, and used words to the effect of "this is not the worst case we have seen". The applicant on several occasions recalled and made reference to the specific wording during this incident. The representative of Security Services did not indicate he had sensitivity training in the instance of sexual harassment and threatening behaviour, and was vague in his recollection of the events; nor did he indicate whether they had experience in women's safety initiatives. I find that the representative of Security Services did not intend to offend the applicant but, nonetheless, this was the result.

[26] After the meeting with Security Services, the applicant's husband left a voicemail message for Dr. Vanderlee indicating that he was not pleased with the response by Security Services. Dr. Vanderlee returned this call and the applicant's husband indicated that security would not assist. In response, Dr. Vanderlee again offered to sit in on the applicant's classes but the applicant's husband declined on her behalf. He also said he would escort the applicant to her class.

[27] Dr. Vanderlee reported this conversation to Ms. Paine-Mantha. Subsequently, Ms. Paine-Mantha, Dr. Chase and Dr. Vanderlee met with Mr. Cotie, Manager of Security Services to discuss the issue. Dr. Vanderlee contacted the applicant's husband following this meeting, at which point the applicant's husband advised that the security

arrangements in place were fine. The applicant was unaware that Dr. Vanderlee spoke by phone with her husband.

University's Efforts to Identify the Sender of the Offensive Email

[28] Dr. Vanderlee contacted the University's Technology Services on Monday morning and asked them to conduct an investigation to identify the sender of the offensive email message. Dr. Vanderlee forwarded the email in question to Technology Services, and asked them to "try and find the IP address or any information you can from your end related to this email".

[29] A representative of Technology Services wrote an email message to the applicant and members of the respondent's administration indicating that he had contacted the applicant and reviewed the system logs. He confirmed that the email was sent from a Hotmail IP address based in Redmond, Washington (where Microsoft is Located). He reiterated that Microsoft likely would not cooperate in providing the accountholder's name without a warrant.

[30] Technology Services was able to trace the offensive email message to a particular computer in the University Library. The computer in question was a public computer, and available for use by anyone in the Library. No "logon id" was required in order to use it. For anti-virus and security reasons, public computers at the respondent University were set up to power down at the end of the day and reboot the next morning, and all transient data stored on the unit is lost when the unit is re-booted. As a result, there was no data on the unit in question to assist Technology Services to determine who was using the computer in question at the time the e-mail message was sent.

[31] Technology Services' investigation was completed by mid-day, and the matter was referred to Security Services (via the Privacy Officer) for further investigation. Technology Services inquired of the University's Privacy Officer, first verbally and subsequently in a follow up email, about whether there were any surveillance cameras

or physical computer logs that might assist in identifying the individual who was using the computer at the time the email was sent.

[32] Security Services investigated the possibility of surveillance evidence or physical computer logs which would assist in identifying the sender of the offensive e-mail. However, no surveillance cameras were in the area and no computer logs are kept. Security Services also questioned Library staff early in the week of April 3, 2006 about whether they had observed anything suspicious on the afternoon of March 31, 2006. However, none of the staff questioned were able to recall anything noteworthy.

[33] Technology Services also submitted a request to MSN Hotmail seeking the identity of the accountholder, "dianneslover@hotmail.com", and asking MSN Hotmail to close the account on Monday afternoon. A response was received from MSN Hotmail the following day stating:

> Hotmail respects the privacy of our members. Our Privacy Policy does restrict us from viewing our member's information and because of this, I will not be able to provide you with the information you need. We do not have any tool that can allow us to view the personal records in our servers. This is in compliance with the Electronic Communications Privacy Act (ECPA) in the United States, and other privacy regulations worldwide.

[34] The message from MSN Hotmail invited Technology Services to "report the account so that they could take actions and possibly close the account".

[35] In a subsequent email message, Technology Services advised University management that they did not believe the email would violate the Hotmail user agreement, so they did not believe reporting the account was worth pursuing.

[36] A representative of Technology Services also sent an email message to the applicant and various individuals providing a status report on the investigations to that point indicating that they "may have stumbled across some information that might be useful to Security", and stated that he had "provided this information to the Privacy Officer and she intends to contact Security accordingly".

[37] The applicant noted in her response that she was not afraid of something "happening in class" and wished to have someone sit in on the class to "allow me to focus on teaching not the other stuff". She continued,

> If Peggy could check to see if that individual is registered in one of my remaining classes (tomorrow's HR — ADMN1137 or stats ADMN 2606) that would be helpful. If that individual is, then I would like someone else present during my class. (I don't need to know who the student is, as I'd rather not know that as it could affect my evaluation of their grade.) Security was only willing to walk me to the class, not sit during it. As a result, Tim walked me to the class this morning. I'm not afraid of something happening in class as there are 'witnesses', but it would help me feel less vulnerable and allow me to focus on teaching not the other stuff. Even if it's Jack Jones sitting in to "give me feedback on my lecture style" that would be helpful to me. If the person is not registered in my remaining classes, then I'm not asking for the sit-in.

[38] The applicant maintained during her testimony that Jack Jones would be acceptable to attend class for feedback on her teaching because it was not uncommon for him to do so. Her preference was to have a plainclothes member of Security Services present during these classes. In her view, Dr. Vanderlee or uniformed security personnel would be disruptive to the class. Mr. Cotie the Manager of Campus Security indicated in his testimony that he agreed with the applicant respecting the disruption that uniformed security personnel may cause in the classroom.

[39] The applicant refused to cooperate in the investigation by identifying the student she suspected of sending the email. Security did not begin interviewing students from the applicant's classes until late in the week after the Monday meeting.

Invigilation of Examinations

[40] The applicant was required to invigilate a final exam on Thursday, April 13, 2006, "by myself in an isolated setting for the class that most likely had the offending student in it". She alleged that her experience invigilating the examination caused her to experience pregnancy-related complications and this led to the premature birth of her son. In her Application she states:

> That night after the exam, I was hospitalized as my [water] broke, which was due to the distress associated with these events according to my obstetrician and midwife. (…) The result of the stress I endured was the premature birth of my son and our [hospitalization].

While it is true that the applicant experienced complications with her pregnancy and delivered her baby preterm, the applicant did not demonstrate on a balance of probabilities that the premature birth of her son was caused by the stress related to the offensive email.

[41] The applicant indicated that she had undertaken her own research into what may have been the cause of her son's premature birth. She found that the stress related to the alleged sexual harassment could have been a contributing factor and said that this was supported by her midwife and obstetrician/gynecologist. She did not provide any medical evidence to link the premature birth to the events arising from the offensive email.

[42] Medical evidence led by the respondent indicated that stress related to the invigilation of the exam did not cause the premature birth. Given the absence of any direct medical evidence to support the applicant's theory, I am unable to find the applicant has met her burden of proof on a balance of probabilities with respect to this allegation.

Resignation and Exit Interview

[43] By letter dated April 24, 2006, the applicant provided notice of resignation effective December 31, 2006. Her letter of resignation, which was addressed to Dr. Vanderlee, expressed regret that she would be leaving the University, and thanked Dr. Vanderlee for his leadership and support while requesting that the investigation of the sexually harassing email continue. As she noted,

> On a personal note, Rick, you have been most impressed with your leadership and your support and assistance on the administrative issues I've had over the past year, like the parental leave, academic dishonesty of students and the sexual harassment case by the unknown student

> (which I hope for Nipissing's sake, does not become a lost file on a desk in administration, and the student be held accountable for his actions). In particular your support with the latter issue was greatly appreciated! I felt several times you went above and beyond the call of Dean to ensure my safety and well-being.

She also indicated that she was resigning to take a position at another university because she felt that position offered career opportunities and work-life balance opportunities she "could not in all good conscience pass up."

[44] As a matter of standard practice, when a faculty member resigns, they are asked to complete an exit interview questionnaire. The applicant's exit interview indicated that career and family considerations and workload and compensation issues were the primary factors motivating her to resign. When asked what her new position offered that her position at the University did not, the applicant responded:

> 50% more pay, maximum teaching load of 2-2, 3 conferences fully funded anywhere in the world per year, $5,000.00 research funding per year without applications, colleagues in her research areas, a better defined tenure and promotion process with regular feedback, and recognition of 4A in SSHRC. Better work/life balance due to lower teaching load. Lower committee/service requirements.

[45] The applicant also raised concerns about the events flowing from the offensive email. While she acknowledged that these events were "not a primary reason for leaving" she indicated that "if I did not already have the other job offer, I would be actively seeking employment elsewhere and I would have seriously considered not returning post-maternity leave". She concluded by noting that "I am still considering legal and/or union action pending the outcome of the President's actions to ensure this doesn't happen to another faculty member."

Discussions with the University President

[46] The applicant met with the personal respondent, Dr. Mock, President of the respondent University, in June 2006 to discuss her concerns. At the end of this meeting Dr. Mock offered to look into the issues that the applicant was raising and get back to her.

[47] Dr. Mock indicated in his evidence that at the initial time the offending email was sent he was advised of the incident and was concerned. He inquired as to the investigation and matters undertaken to support the applicant. He was advised that the respondent`s management team was taking steps to deal with the problem. This gave him confidence that a good team was in place to deal with any issues arising, and he heard nothing more on the matter until his meeting with the applicant in June. Dr. Mock then made further inquiries into the events surrounding the offensive email message. Among other things, he asked Ms. Paine-Mantha to put together a report on the steps that had been taken, so that he could respond to the applicant's concerns. He indicated that when he received this report he felt that the appropriate steps had been taken and he was comfortable with the process. He was delayed in getting back to the applicant due to vacation and other responsibilities. He did not explain why the matter of the offensive email and subsequent investigation were not reported to him by university administration earlier.

[48] Ultimately, the University was unable to discover the identity of the individual who sent the email to the applicant. It closed its investigation file.

[49] On October 2, 2006, in response to a general email circulated by Ms. Vander Wall seeking suggestions for initiatives concerning women's safety on campus, the applicant sent a response to all recipients indicating she was dissatisfied with the University respondent's efforts to react appropriately to the matters arising from the offensive email. As she indicated,

> When a female employee, a faculty member or student is sexually harassed (or harassed in general — or if a male is harassed, sexually or otherwise), why not create consequences for the harasser instead of burying the issue or creating excuses? In the past year, I am aware of 11 cases of sexual harassment (students, 8 faculty — myself included by a student when I was 7 months pregnant — according to the doctor, the associated stress resulted in the premature birth of my baby). Instead of dealing with the student (who could have been identified by computer Logs and surveillance videos), the university turned a blind eye to the offender and I was left to invigilate an exam in an isolated setting (the trigger event as that night I was hospitalized). Granted, the two VPs and

> Dean offered apologies and sympathies during the experience, and the IT group, headed by Bill Ross, were great in hunting down the offending computer.
>
> To my knowledge, in none of the cases were the harassers held responsible for their actions in any way shape or form. This is unacceptable for women's safety. When a security officer says, "Oh, this isn't the wors[t] case we've seen", and refuses a request for safety precautions, then we have a problem on campus. When the President of the university apologizes and promises to follow up and then fails to do so within a four month period, then we have a problem....

She subsequently filed her complaint with the Commission.

[50] The applicant indicated that she was traumatized by events arising from the offensive email. It had been very stressful on her family relationships and she continued to experience fear when facing a male student. She required counseling and believes that she may continue to do so. Her sleep was disturbed and she suffered significant anxiety attacks during following weeks. In a medical report dated June 2, 2009, Curt Hillier M.Sc. Registered Psychologist noted that the applicant

> (…) currently continues to experience a number of post traumatic stress symptoms …. Hyper vigilance in dealing with students, disturbances of mood, distractibility. Her quality of life has been and continues to be negatively impacted. She will likely benefit from cognitive behavioral psychotherapy to address her chronic residual symptoms.

It was clear when she was giving evidence and had to recall the events of April 2006 and subsequent related matters that it remains a fresh and painful memory. I accept this evidence that the applicant will need ongoing psychotherapy.

Analysis

Did the applicant experience discrimination and harassment in her employment on the basis of sex contrary to ss. 5(1), 5(2) and 7(2) of the Code?

[51] The relevant provisions of the *Code* are:

> 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of

origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

7(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

(3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

[54] The parties do not dispute and I have no difficulty concluding that the email constitutes harassment within the meaning of the *Code.*

[55] I must turn my analysis to the question of whether the "directing mind" of the respondent (1) met its substantive obligations under the *Code* by appropriately responding to the harassment; and (2) met its procedural obligations under the *Code* by appropriately investigating and responding to the applicant's complaint.

Did the management of the respondent University respond and investigate the harassment adequately?

[56] To assess the response and investigation of the respondent, I will apply the test outlined in *Laskowska v. Marineland Inc.,* 2005 HRTO 30 (CanLII). It is as follows:

1. Did the employer meet its obligation to provide a healthy work environment?
2. Did management communicate its actions to the applicant?
3. Was the issue dealt with seriously?

4. Was the respondent prompt in dealing with the harassment complaint?

5. Was there an awareness by the employer that sexual harassment is prohibited conduct?

6. Did the employer demonstrate that there is a complaint mechanism in place?

I will address each question below.

Did the employer meet its obligation to provide a healthy work environment?

[57] The applicant noted in her response that she was not afraid of something happening in class" and wished to have someone sit in on the class to "allow me to focus on teaching not the other stuff". I am aware that the respondent's response is not measured against the "best option" or perfection, but adequacy or reasonableness. Also, the applicant cannot demand a particular response if the response offered meets the adequate/reasonable standard.

[58] I note that section 35(2) of the *Private Security and Investigative Services Act*, 2005, S.O. 2005, c. 34, requires a private security guard to wear a uniform while acting as a security guard unless (a) acting as a bodyguard or (b) preventing theft. This arose from an amendment to the *Act* in 2007 and was not in effect at the material times.

[59] Although I appreciate that the applicant had been threatened and was in a very difficult position as she continued to fulfil her teaching duties, I cannot conclude that the only reasonable response would have been to provide a plain-clothed security officer to attend her classes. In reaching this conclusion, I am mindful that the applicant stated she was not particularly concerned about an incident occurring in the classroom and that the University offered other alternatives to her. While the applicant may have felt that the presence of the Dean would be disruptive, I find that this was not an unreasonable response.

[60] The applicant explained that the best and most appropriate response would have been a plain-clothed security officer. My role, under the *Code,* however, is not to assess the respondents' reaction against the best or most appropriate standard. My role is to

determine whether the respondents responded reasonably to the harassment. Applying this standard, and in light of the other options made available to the applicant, the decision not to provide plain-clothed security for the few remaining classes and exams was not unreasonable.

[61] In these circumstances, I also find that the offer to provide a security services business card, alarm or cell phone was an adequate or reasonable response to the seriousness of the matter.

[62] The applicant failed to cooperate by not reporting the name of the student she suspected could have sent or been involved with the sexually harassing email. Security Services asked the applicant on several occasions to disclose the name of the student she suspected of sending the offensive email. In her email communications during the first weekend following receipt of the message she indicated that she might be prepared to disclose this information. Ultimately, she refused to disclose the student's name to Security Services. This did in some way hamper the investigation. Had the applicant disclosed the student's name, Security Services could have questioned the student and determined if that student was responsible.

Did management communicate its actions to the applicant?

[63] I find that Technical Services communicated its investigation findings promptly and effectively. This should not have been the end of it. Security Services and University administration should have maintained closer contact with the applicant, and as noted above, remained vigilant in close proximity to the applicant. Also, as noted above, Dr. Chase replied to the applicant on behalf of the University the day after the offending email was sent.

[64] In *Laskowska, supra,* one of the factors I must consider in order to determine whether the respondents met their obligations under the *Code* is whether they communicated their actions to the applicant in a reasonable manner. While there was effective communication with the applicant in the first few days after the offensive email

arrived, it slowed to the point where the applicant was not being adequately informed on the investigation and measures taken to respond to the harassment.

[65] The following facts lead me to conclude that communications broke down:

a. The University administration often communicated with the applicant's husband rather than with the applicant directly. While the applicant's husband attended the initial meeting at Security Services with her and participated in group emails, there is no indication that she made him her representative. In considering whether the respondents adequately communicated their actions to the applicant, I cannot find that communicating information about the investigation to the applicant's husband was reasonable in the circumstances.

b. The University administration should have also updated the applicant as to their findings or whether the file was closed when she requested this in her exit interview submissions.

Was the respondent prompt in dealing with a harassment complaint?

[66] Immediately after the offending email arrived, University administration acted promptly, and I believe with genuine concern. Dr. Chase replied on behalf of the University the next day, Saturday, sending his response to all of the other individuals who received the original message from the applicant`s husband, and copying Ms. Vander Wall and Dr. Jones. In his message to the applicant, Dr. Chase expressed his concern that the applicant had been subjected to such an offensive email. There were also many other emails expressing concern for the applicant immediately after the email was sent as well as a meeting with security services on the first Monday after the incident. I therefore find that the University respondent was prompt in addressing the sexual harassment.

Was the issue dealt with seriously?

[67] Dr. Chase expressed his concern that the applicant had been subjected to such an offensive email, and stated that he didn't feel that any sender who identified themselves as a "stalker" should be ignored. With this he acknowledged the seriousness of the matter, further stating that "this incident is extremely serious and needs to be treated as such". He offered to attend class on Monday morning, and noted "if you have a specific request regarding that first class, please let me/us know and we will take the necessary steps to ensure that you feel safe."

[68] For the reasons above, I find that immediately after the offending email arrived the respondent acted promptly and with seriousness. However, the tenacity of this effort was maintained by neither Security Services nor University administration. As outlined above, there were breakdowns in communication.

Was there an awareness by the employer that sexual harassment is prohibited conduct?

[69] Yes; however, awareness and training of how to respond with empathy to the issue of on campus harassment and intimidation was lacking. As noted, Campus Security Services attempted to respond with sensitivity to the c*ir*cumstances, but this failed. There had been no training given by the employer in how to respond to the potential emotional outcomes of sexual harassment and/or threats of sexual assault. There was also no indication of a comprehensive plan or protocol for investigation in such circumstances.

Did the employer demonstrate that there is a complaint mechanism in place?

[70] The respondent University had a Personal Harassment Discriminati*on* Policy in place at the time. This Policy creates a complaint procedure in the event of sexual harassment within University community. However, in order to trigger these procedures, the Policy requires that there be an identifiable respondent. In the matter at hand, due to the fact that the author of the offensive email could not be found, a complaint could not be launched. The applicant indicated that she had suspicions that she may know who

sent the email based on a very loose connection to a phrase used in another email months earlier. As I have discussed, this could have hampered the investigation, but it was not enough for the applicant to trigger the complaint procedures with such a serious accusation.

[71] The central problem with the harassment complaint procedures was that there needed to be an identifiable accused in order to trigger its procedures. In this instance, there was clearly a sexually harassing email sent, but the complaint procedure remained dormant. This closed a line of potential investigation to the applicant. It also precluded policy review that may have been able to precipitate changes that could have benefited men and women who may have encountered similarly vexatious comments in the future.

Conclusion

[72] The respondent University met its duty to provide a safe work environment. The respondent acted promptly to the incident of sexual harassment, but failed to remain diligent in pursuit of the matter. There were serious breakdowns in communication linkages within the University. Policies and procedures in place to address matters related to sexual harassment were inadequate to deal with the offensive and threatening email.

[73] I find that, in responding to the harassment, the respondent University met its substantive obligations under the *Code*. However, because after its initial response, the University failed to remain diligent in pursuing the matter and because of the failure to sustain communications with the applicant, I find that the University did not meet its procedural obligations under the *Code.*

Personal Respondents

[74] The applicant has named numerous individuals as personal respondents. Having concluded that the corporate respondent University of Nipissing has committed a *Code*

violation, I must consider whether any or all of the named personal respondents have harassed the applicant based on sex.

[75] In *Sigrist and Carson v. London District Catholic School Board,* 2008 HRTO 14 (CanLII), the Tribunal refused a request to add various personal respondents, stating as follows at para. 42:

> The unnecessary naming of personal respondents *is* a practice to be discouraged, as this serves to unnecessarily add to the complexity of proceedings and can often operate as a roadblock to resolution. Pursuant to section 45(1) of the Code, a corporation is deemed to be liable for "any act or thing done or omitted to be done in the course of his or her employment by an officer, official employee or agent." Where there is no issue as to the ability of a corporate respondent to respond to or remedy an alleged Code infringement and no issue raised as to a corporate respondent's deemed or vicarious liability for the actions of an individual who is sought to be added as a personal respondent, then in my view the individual ought not be added as a personal respondent in the absence of some compelling juridical reason. A compelling juridical reason may exist, for example, where it is individual conduct of a proposed personal respondent that is a central issue as opposed to actions which are more in the nature of following organizational practices or policies or where the nature of alleged conduct of a proposed personal respondent may make it appropriate to award a remedy specifically against that individuals if an infringement is found.

See also: *Winter v. Arnprior (Town),* 2009 HRTO 713 (CanLII)

[76] The Tribunal has outlined the following questions as a non-exhaustive list to further articulate whether a personal respondent should be removed:

> 1) Is there is a corporate respondent in the proceeding that also is alleged to be liable for the same conduct?
>
> 2) Is there any issue raised as to the corporate respondent's deemed or vicarious liability for the conduct of the personal respondent who [is] sought to be removed?
>
> 3) Is there is any issue as to the ability of the corporate respondent to respond to or remedy the alleged Code infringement?
>
> 4) Does any compelling reason exist to continue the proceeding as against the personal respondent, such as where it is the individual conduct

> of the personal respondent that is central issue or where the nature of the alleged conduct of the personal respondent may make it appropriate to award a remedy specifically against that individual of an infringement is found?
>
> 5) Would any prejudice be caused to any party as a result of removing the personal respondent?

See: *Persaud v. Toronto District School Board*, 2008 HRTO 31 (CanLII) at para. 5

[77] In this case, the respondent University is a party and has clearly indicated that it accepts liability for any violation of the *Code* respecting harassment of the applicant based on sex. While the named personal respondents were part of the "directing mind" of the respondent University, their alleged actions were clearly within the scope of their employment and their actions are not central to the applicants' claims of discrimination. The applicant has provided no compelling reason that the Application should continue as against them, and I therefore remove them as respondents. Accordingly, this matter is dismissed as against the personal respondents.

REMEDY

[78] Section 45.2(1) of the *Code* provides the Tribunal with the authority to direct a party who has violated the *Code* to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

Monetary Compensation

[79] The applicant is entitled to monetary compensation for the injury to her dignity, feelings, and self-respect arising from the breach of her right to be free from discrimination due to harassment in the workplace. Such an award includes recognition of the inherent value of the right to be free from discrimination and the experience of victimization. The effect on the victim, while important, is not the only factor relevant to compensation for intangible loss. It is also appropriate to apply a degree of objectivity in evaluating the circumstances surrounding the violation of the *Code*; see *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 (CanLII).

[80] The Divisional Court has recognized that the Tribunal must ensure that the quantum of damages for this loss is not set too low, because doing so would trivialize the social importance of the *Code* by effectively creating a "license fee" to discriminate: see *ADGA Group Consultants Inc. v. Lane,* (2008) 295 D.L.R. (4th) 425 (Ont. Sup. Ct.).

[81] The Divisional Court has also recognized that humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the applicant; the experience of victimization; the vulnerability of the applicant; and the seriousness of the offensive treatment are among the factors to be considered in setting the amount of damages; see *ADGA Group Consultants Inc., supra* at para. 154.

[82] An order for compensation for injury to dignity, feeling, and self respect is a discretionary award. In order to determine the appropriate monetary compensation for injury to dignity, feelings and self-respect, the Tribunal is required to make a general evaluation of the circumstances of the *Code* violation, and the resultant effects that treating a person as less worthy through discrimination based on a personal characteristic has had on that individual's psychological well-being. The criteria for assessing damages was outlined in *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII), when stating at paras. 52-54:

> The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 at para. 16 (CanLII).
>
> The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

> The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at paras. 34-38.

[83] In this matter, the respondent reacted to the threat posed by a sexually harassing email with seriousness, promptly, and maintained a reasonably healthy work environment. As noted above there were flaws in the communication with the applicant, harassment policy and procedures and staff training in sexual harassment. I am conscious that this was a single threatening email and not a prolonged or systematic series of emails. During the period of the investigation of the matter and subsequently the applicant did suffer anxiety and other psychological effects. I accept the applicant's evidence that as a result she experienced an injury to dignity, feelings, and self-respect.

[84] I conclude that, in the circumstances of this case, an award of $8,000 to compensate the applicant for loss of dignity and the injury to her feelings arising from her right to be free from discrimination due to sexual harassment is appropriate. During the hearing the experience of having been harassed in the workplace was clearly still deeply troubling to her years after the event. She gave evidence that this added apprehension during her pregnancy, continues to create fear at work (especially around male students and colleagues), and has had a negative impact on her family relationships.

[85] The applicant will also require ongoing psychotherapy to address anxiety problems, damaged family relationships and disturbed sleeping patterns that have arisen from her experience of being sexually harassed and her concerns during the period following. The applicant submitted receipts from her psychologist and payment remittance forms from her insurer. She was reimbursed approximately one half the amount of the receipt. The psychologist's report indicated that she would "likely" benefit from ongoing therapy. I accept that she will need to attend counselling at least once per week for six months at a cost of $150.00 per session. Given that she will receive some

reimbursement for these costs, an award of $1,950.00 in compensation is appropriate.

ORDER

[86] The corporate respondent, Nipissing University, is ordered to:

a) pay to the applicant $8,000.00 as monetary compensation for the loss arising out of the infringement of the *Code*;

b) pay to the applicant $1,950.00 for ongoing counselling and psychotherapy;

c) pre-judgment interest (calculated from the date of the Complaint to the Commission) and post-judgment interest (calculated from 30 days from the date of this Decision) in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, on both amounts; and

d) review its policies and complaint procedures related to sexual harassment and ensure that they are in full compliance with human rights principles and *Code* provisions.

Dated at Toronto, this 28th day of January, 2011.

"Signed by"

_____

David Shannon
Member