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Indexed as: Employee v. Employer, 2020 BCHRT 4

IN THE MATTER OF THE *HUMAN RIGHTS CODE*,
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Employee

COMPLAINANT

AND:

Employer

RESPONDENT

**REASONS FOR DECISION
APPLICATION TO DISMISS
Section 27(1)(c)**

Tribunal Member:

Emily Ohler

Counsel for the Complainant:

Sara Hanson

Counsel for the Respondent:

Richard Press

I INTRODUCTION

[1] The Employee filed a complaint against the Employer alleging discrimination on the basis of sex regarding employment contrary to s. 13 of the British Columbia *Human Rights Code* [Code].

[2] The Employee says that the Employer failed to provide a safe working environment and failed to take appropriate action following her complaint of sexual assault and harassment against a coworker. The Employer denies discriminating and applies to dismiss the complaint under s. 27(1)(c) of the *Code*. For the reasons that follow, I have denied the application.

[3] While I do not refer to it all in my decision, I have considered all of the information filed by the parties in relation to this application to dismiss. This is not a complete recitation of the parties' submissions, but only those necessary to come to my decision. I make no findings of fact.

II BACKGROUND

[4] The Employer is a logging and roadbuilding company. Among its activities, it maintains a road [Road]. The Road runs East to West and has two parts separated by a river. The Employer has a camp to the west of the river [Camp] where employees are periodically required to stay.

[5] The Employer hired the Employee in 2015 as a grader operator to maintain the Road.

[6] On her first day of work, the Employee met with the Occupational Health & Safety Manager [OHS Manager] for orientation. The Employee says the entire meeting lasted only 20 minutes, and there was no discussion of policies regarding sexual harassment in the workplace. The OHS Manager remembers the Employee's orientation because there are so few female employees in the field, he says. The Employee was the Employer's first female machine operator. He says he told the Employee that if any issues arose, she should go to him.

[7] During her employment, the Employee lived in a nearby town, but while grading a particular remote section of the Road, the Employer required her to stay in their Camp. During

busy times, there were at least 20 crewmembers staying in the Camp, but the Employee was only ever one of three women staying there.

1. Events prior to April 1, 2017

[8] Shortly after beginning her employment, the Employee met a coworker who worked as a road builder [**Coworker**]. During a period while she was laid off from work, the Employee began spending time with the Coworker outside of work and they developed a friendship.

[9] The Employer says that the Employee was frequently seen with the Coworker in social settings and at each other's residences. They would drive together, sit together in courses, and according to the Employer, "generally display body language that suggested a relationship beyond just friendship." The Employer asserts that when someone wanted to find either the Employee or the Coworker, they would ask the other because they spent so much time together.

[10] The Employer says that the Coworker had mentioned to various people that he was in a sexual relationship with the Employee and had told a colleague that he was considering ending that relationship.

[11] The Employee says that while she and the Coworker had a friendship, it was never a sexual relationship. However, the more time they spent together, she says, he began to touch her in a sexual manner without her consent and make sexual comments about her body.

[12] The Employee was laid off during the winter of 2015-2016. When she was called back to work in March 2016, she says that she told the acting supervisor at the time that the Coworker was going to be a problem for her and that he had been stalking her. There is no evidence from the then acting supervisor to corroborate or deny this, but it is undisputed that if the conversation did take place, he did not report it to management. The Employee also says that in April 2016, she told the President of the Employer, who is also a co-owner, that she was having issues with the Coworker, and he told her they were her issues. The President has no

recollection of this, and submits evidence suggesting he was not at Camp during the period the Employee recalls having this conversation.

[13] In July 2016, the Employee says that the Coworker raped her outside of work. She told no one about the assault but says that thereafter the Coworker began touching her at work in a sexual manner without her consent. In response, she says, she frequently told him not to touch her and to “fuck off”. It is not disputed that she did not raise this issue at the time with the Employer, and notes from later meetings show her saying she had tried to deal with it on her own.

[14] The Employee says that on January 11, 2017, the Coworker showed up to her home and told her that the GM had instructed the Coworker and her to stay out at the Camp the next night to catch up on work. The Employee says that she found this strange because until that time she had been taking directions from a different senior employee. She says that when she questioned the Coworker about this, he told her he would be acting supervisor.

[15] On January 12, 2017, the Employee travelled out to the Road with the Coworker. After work that day, she says the Coworker shoved one of his hands down the front of her pants and tried to kiss her on the side of her neck. She says she pushed him off and told him nothing was going to happen between the two of them. She says the Coworker told her he was going to go to her room later that night, and so she locked her door that night because she was afraid.

[16] On January 26, 2017, the Employee’s grader overheated while she was working and so she radioed for help and a colleague said he would come pick her up. A while later, however, it was the Coworker who showed up. As they drove, she says he began making sexual comments and moving closer to her. She alleges that he then reached over, aggressively grabbed her breast, and made sexual comments to her. She says that she was very scared in that moment because she was alone in the Coworker’s truck, in the dark, on the remote logging Road far from Camp. She had to rely on the Coworker to return her safely to Camp. She says that frozen with fear, all she could manage to say was, “we should go”.

[17] The Employee says that the Coworker continued to touch her in a sexual manner at work and make unwelcome sexual comments towards her. The Employee's journal shows several subsequent notes of physical contact with the Coworker and sexual comments made to her, including his referencing coming to her room at night.

[18] She says that she did not immediately report the assault or the other incidents of harassment to the Employer because when she first reported her concerns about the Coworker in 2016, she had been ignored.

[19] The Employee says that she tried to avoid the Coworker as much as possible but this became more and more difficult as he began working more frequently in her area and staying at the Camp. She began feeling more stressed and anxious as she feared having to interact with him at work and as a result, on March 21, 2017, she says she had a breakdown at work and decided to quit. She packed up her belongings and started walking back towards the town where she lived. As she was walking, she ran into the GM who was driving along the road she was walking down.

[20] The Employee's and the GM's accounts of this meeting are generally consistent. While the Employee initially said that she did not have the proper tools to do her work, that her grader was subpar, and that her paycheck had errors for the last three payrolls, she eventually told the GM that the Coworker had grabbed her breast, explaining the incident two months earlier on January 26, 2017, and that the Coworker had sexually propositioned her while they were in Camp.

[21] The GM replied by saying something to the effect of, "okay, haven't you two been sleeping together for some time now?" To this, the Employee responded that there was no relationship and she had never had sex with the Coworker.

[22] The Employee says after saying he thought she and the Coworker were in relationship, the GM said that he was not going to make special accommodations for employees who chose to date. She says that the conversation became quite heated with the GM raising his voice at her until she said in a loud voice that she had never been in a relationship with the Coworker

and had never willingly had sex with him. The GM did not dispute this in reply. In any event, the GM told the Employee he did not want her to quit and promised he would speak with the Coworker so he would not bother her anymore. She says he also promised that the Coworker would apologize to her. The GM says he told the Employee he would talk to the Coworker and tell him to stay away from her. He asked if this would be acceptable to her and she said, "yeah. That's fine." They returned to Camp together and went back to work.

[23] The GM says that when he confronted the Coworker, the Coworker denied having engaged in any wrongdoing and denied sexually assaulting the Employee. The Coworker also asserted that he had been in a sexual relationship for over a year with the Employee.

[24] The day after this conversation between the Employee and the GM, after the end of shift, the Employee approached a group of her colleagues which included the GM and the Coworker, asking if anyone had some tools to fix the wipers on her grader. The GM says the Employee was smiling and looked happy. The GM says that the Coworker indicated he had the tools, and so the GM asked the Employee if it was okay if he gave the tools to her. She responded, "no problem". The Coworker then proceeded to fix the wipers but did not attempt to talk to the Employee. The GM says that the Employee stood about 5 feet away from the Coworker during this time. He says that he allowed the Coworker to help fix the Employee's wipers "because the grader was close and I and all the other employees present could clearly see what was happening. If I hadn't been able to monitor the situation I would not have allowed [the Coworker] to assist."

[25] The GM says that afterwards, he approached the Employee to confirm that she was comfortable with what had happened, and she assured him that things were good. The GM goes on to say that the Employee's body language during this time suggested she was comfortable with the Coworker. He says she told him that she had asked the Coworker why he was helping her, and the Coworker had responded, "I help everyone". The GM says that when she told him what the Coworker had said about helping her, "she sounded like there was admiration or thanks in her voice, like she really appreciated his gesture."

[26] The Employee, conversely, describes this incident as having been forced to interact with the Coworker after she sought assistance to fix a part on her grader. She says that the Coworker offered to do so, and instead of intervening, the GM allowed the Coworker to assist her. She says she felt very uncomfortable with this, and when the GM later asked if everything was okay, she understood the question to be about the grader not about being assisted by the Coworker.

[27] On March 24, 2017, the Employee spoke with the President of the Employer and told him about the January 26, 2017 assault. The President says that the Employee told him she was going to quit because the Employer valued the Coworker more. He says he was not aware of any favouritism and so asked the Employee to explain. The President says the Employee explained that the Coworker always got her shift if he wasn't working his normal job. He disagreed. The Employee also said she felt the Employer was setting her up for failure because of an issue with her grader. He disagreed. The President says that the Employee then mentioned she was not comfortable working with the Coworker because he had told people they had slept together and she felt awkward around the crew. He says she then "mentioned in passing" that the Coworker had also made inappropriate comments and touched her when she did not want to be touched. At this point, the office was closing so the President told the Employee they would have to wrap up the discussion. He says at that point the Employee told him that another female employee was always in the Coworker's room at Camp. The President says that the way the Employee made this remark gave him the impression she was jealous of the attention the Coworker was giving the other employee.

[28] The President says that while the Employee's comments concerned him, her statement about the other employee made him wonder if she was just upset because she was jealous of the other employee and thought that her comments about the Coworker were perhaps an afterthought to boost her points about favouritism. Regardless, he promised the Employee that he would look into the inappropriate comments. He says he felt he needed to get a better understanding of what was going on. He did that by talking to the GM.

[29] On March 25 or 26, 2017, the President spoke with the GM and told him what the Employee had said about the Coworker. The President says the GM responded that he

understood there was a relationship between the Employee and the Coworker. His notes show that the GM said “they had been sleeping together for quite a while...she was probably pissed about the grader wing.” The President says he did not hear anything else about the matter for 10 days.

[30] The Employee says that on Sunday, March 26, 2017 she felt scared and anxious about returning to work the next day and so she texted the President to say she was not going to stay in Camp during the week. She says the President told her to speak to the GM. She spoke with the GM saying she did not want to stay at Camp that week because the Coworker was still there. She says the GM asked her what she had in mind and she suggested commuting back and forth from her home without being paid for travel time. She says she offered to do so because she knew that the GM would not want to pay her for travel time. The GM agreed. The Employee says that she told the GM that everyone was losing out from the situation except the Coworker. The Employee proceeded with this plan, commuting back and forth to Camp adding an extra 4 to 5 hours to her day as a result.

[31] The Employee says that on March 31, 2017, the GM asked her if she could stay in the Camp to catch up on work, promising that the Camp would be empty and the Coworker would not be there. She says that during this conversation the GM again mentioned he believed that she had been in a relationship with the Coworker, to which she replied again asserting that she had never willingly been intimate with him. She says she repeated her concern that the Coworker was the only one not losing out from the situation, to which the GM replied, “that’s what you requested”, before leaving. This is generally consistent with the GM’s own recollection of the conversation. He notes that he expressed concern about her working long days and then driving 160 km a day. He says she said at this point that it was not fair she was losing her travel time while nothing was happening to the Coworker. He says he was confused because it had been the Employee’s idea, and he did not understand why the Coworker came into it. He says the Employee appeared frustrated by the response, and he wondered if it related to her complaint of a few days earlier. He told her he could put her in a different dorm

in Camp so she would not be in contact with the Coworker. The next day, she went off sick, however, so there was no follow-up on the suggestion.

[32] The Employee says that while she had initially agreed to work that weekend, she felt distraught and overwhelmed by the situation and so texted the GM on April 1, 2017 saying she was sick and would not be at work.

2. Events after April 1, 2017

[33] On April 2, 2017, the Employee went to the RCMP and filed an official criminal report against the Coworker, who was charged with two counts of sexual assault and two counts of uttering a threat to cause bodily harm. He was released on the condition that he could not attend at the Employer's work site. The Employee also went to see the doctor, who completed a physician's report for WorkSafeBC indicating she was suffering from acute situational crisis and had to remain off work for 14 to 20 days.

[34] On April 5, 2017, the GM asked the OHS Manager to check on the Employee to make sure she was okay. The OHS Manager says that the Employee had never raised a complaint with him about sexual harassment or about the Coworker. The OHS Manager asked the GM what was going on, and he explained that the Employee had been sick for the past few days, not responding to texts, and he was concerned about her health. He also mentioned that she had started a claim with WorkSafeBC and explained the allegations against the Coworker.

[35] On April 6, 2017, the President received a call from the RCMP, who was asking when the Coworker was coming out of Camp. The RCMP advised that they were looking into a sexual assault at a logging camp and asked if the Employer operated one. The President confirmed that the Employer did operate a logging camp, and advised the RCMP that he believed the Coworker would be coming out of Camp the following day. Also on April 6, 2017, WorkSafeBC contacted the GM and told him that the Employee had filed a complaint related to harassment by the Coworker.

[36] On April 7, 2017, the OHS Manager, the GM, and the President had a call with WorkSafeBC, where they were told not to contact the Employee under any circumstances. The GM told WorkSafe that he did not understand what was going on, to which WorkSafeBC asked if the Employee had told them about harassment by a Coworker. The GM responded that she had. The President says that WorkSafeBC was “very blunt” and was treating them like they had done something wrong, and that they were not good people.

[37] On April 12, 2017, the Employee sent a message to the President requesting a meeting because she wanted to know where the Employer was at with the investigation of her complaint. It is not apparent to me what, if any, steps the Employer was taking at that time in that regard. The President did not respond because he was on holiday and was concerned about the WorkSafe instructions not to contact the Employee. Eventually, WorkSafe allowed the Employer to speak with the Employee.

[38] The OHS Manager spoke with the Employee, who told him that she felt she had no real backing from the Employer and felt they had abandoned her. He says he explained to her that they had not been in contact because of WorkSafeBC’s direction, and that they had not been ignoring her. They talked about arranging a meeting.

[39] On April 14, 2017, the Employee met with the OHS Manager and the GM, believing the purpose was to receive an update on the status of her complaint. She says that while she attempted to tell them about the other times the coworker had sexually assaulted and harassed her, they did not seem interested and repeatedly told her they were only there to “scratch the surface” of her complaint. The Employer says this was their understanding of WorkSafeBC’s instruction. The Employee says she left with the impression that the Employer was more concerned about protecting the Coworker than her, and she felt nervous about returning to work because she had no assurance that she would not have to interact with the Coworker. The OHS Manager told the Employee that if the Coworker denied the sexual assault, she would have to understand that it was not a one-way street – they would need to stay away from each other.

[40] The OHS Manager says that during the meeting, the Employee explained instances of inappropriate contact from the Coworker, including the January 26, 2017 incident. After her explanation, the OHS Manager says that he explained that he was under the impression that she and the Coworker were in a relationship. After the Employee said that they had a friendship that was never intimate, the OHS Manager told her that regardless, the conduct she described by the Coworker was unacceptable and inappropriate. They went on to discuss strategies for getting her back to work after some time off. The OHS Manager says that throughout the April 14 meeting, he made it very clear to the Employee that he and the Employer fully supported her and wanted her to return to work. Notes show a lengthy discussion amongst the participants about how to move forward, but it does not appear that strategies for keeping the Employee and Coworker apart were a part of that discussion. The Employee says that she felt nervous about returning to work after that meeting because she had no assurances from that meeting that she would not have to interact with the Coworker.

[41] On May 3, 2017, the Coworker advised the President that he could no longer work for the Employer because a judge had told him he could not be that close to the Employee.

[42] The Employee says that while she had initially planned to stay off work until June 1, 2017, she could not afford to do so and as a result got a doctor's note on May 2 clearing her to return to work. She texted the OHS Manager about returning to work the following Monday, May 8. She says that when they spoke later that day, he sounded surprised she wanted to return to work and suggested it may not be possible because they would have to make arrangements.

[43] On May 8, 2017, the Employee returned to work. That same day, the President was testifying in Provincial Court to vary the Coworker's bail conditions to allow him to return to work. He was testifying about how the Employer could keep the Coworker and the Employee a set distance apart, namely 40 km. It is not clear from the materials before me what the Employer's plan was in this regard. In any event, they submit that they took steps to return the Coworker to work and ensure he did not come within 40 km of the Employee.

[44] On arriving at work, the GM advised the Employee about what was happening – that the President was going to court later that day to support the Coworker in returning to work. The Employee says that he told her he thought the situation with the Coworker had been blown out of proportion. The GM corroborates this, as he states it was blown out of proportion in the sense that the Coworker could not be at work regardless of where. He told her he said it would be okay if the Employee and the Coworker were kept at opposite ends of the area without any issues and told her it would not be hard to do that.

[45] Later that day, the Employee learned from Victim Services that the Coworker's bail conditions had in fact been varied to allow him to work as long as he was not working within 40 km of her. That evening, she received a text message from the OHS Manager advising that the Coworker would be travelling into and staying at Camp for quite some time, and confirmed that she would not be at work for the next two days. She says that while she did not want to lose two full days of pay, she felt she had no choice and so she said okay.

[46] On May 11, 2017, the Employee returned to work and had an accident with her grader, which was found to have had worn tires. She nonetheless continued to work on that broken grader throughout the following week. The GM says she told him about the accident and said he should fire her, to which he said he would not.

[47] On May 19, 2017, the GM asked the Employee to drive the grader to the end of the Road to be transported into town for repairs. She says he did not offer to put her back to work the following week on a different machine and so the Employee had no work for that entire week.

[48] Around this time, the Employee says she felt the Employer was intentionally denying her work because she complained about the Coworker, and she was concerned about her safety because the Coworker was back at work and the Employer appeared to be prioritizing support for him over her. As a result, she decided to find a job in a different community. She says that she told the GM and the OHS Manager that she would be going to Ontario for family reasons, but says this was not true. She says that she did not in fact go to Ontario but was concerned

about her safety and did not want anybody from her small community to know where she was going.

[49] On May 28, 2017, the Employee commenced a new job in a different community, and says that she was not aware that the Employer was holding her job or continuing to pay her benefits.

[50] In the meantime, in December 2017, criminal charges against the Coworker were stayed.

III ANALYSIS AND DECISION

[51] The Respondent has applied under s. 27(1)(c) of the *Code* to dismiss the complaint on the basis there is no reasonable prospect it would succeed at a hearing.

[52] Section 27(1)(c) of the *Code* serves a gate-keeping function through which the Tribunal exercises discretion to dismiss those complaints that do not warrant the time or expense of a hearing. At this stage, the Tribunal considers whether there is no reasonable prospect that facts supporting the complaint will be proven at a hearing: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, leave to appeal ref'd [2006] S.C.C.A. No. 171. On such an application, the respondent has the burden to show the complaint has no reasonable prospect of success.

[53] To succeed in her complaint at a hearing, the Employee would have to establish that she has the protected characteristic of sex; that she experienced an adverse impact regarding employment; and that her sex was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[54] If the Tribunal determines that there is no reasonable prospect that the Employee will establish one or more of these elements, it may dismiss the complaint. The complaint must be based on more than speculation: *Berezoutskaia* at paras. 24-26.

A. Scope of the Employer's liability

[55] The Employer argues that this complaint is limited to its response to the Employee's allegations of sexual assault and harassment against the Coworker, but is not about the assault and harassment itself. The Employee, conversely, asserts that it is in fact about both.

[56] The Employee relies on section 44(2) of the *Code* which provides:

an act or thing done or omitted by an employee, officer, director, official or agent of any person within the scope of his or her authority is deemed to be an act or thing done or omitted by that person.

[57] The Employer argues that s. 44(2) of the Code is not applicable because:

- The Coworker was not acting within his authority;
- Harassment and violence of the type alleged to have occurred are prohibited and not tolerated by the Employer;
- The conduct was not disclosed until March 2017, such that the Employer could not have known about it until March 21, 2017 (I note on this point there is dispute in the evidence as to whether the Employee raised her concerns about the Coworker previously with the President and previous acting supervisor); and
- The first allegation of sexual assault is alleged to have occurred outside of the workplace.

[58] The parties cite *Daley v. BC (Ministry of Health) and others*, 2006 BCHRT 341 [**Daley**] in arguing that the Employer is liable for the Coworker's conduct in respect of the various sexual assaults and sexual harassment. *Daley* has become a leading authority in considering when it would not further the purposes of the *Code* to proceed against an individual respondent when an institutional or corporate respondent is also named.

[59] In my view, *Daley* is of limited assistance here in considering whether the Employer is liable under s. 44(2) for the acts of its employee. In that regard, what neither party has cited is

Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84 [**Robichaud**], or *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 [**Janzen**] where the Supreme Court of Canada considered the question of whether an employer was liable for the actions of an employee who had sexually harassed another employee.

[60] *Robichaud* was cited by the Tribunal in *Daley*, when it said at para. 48 that s. 44(2) “reinforces and gives statutory expression to the principles enunciated by the Supreme Court of Canada in *Robichaud v. Canada*, [1987] 2 S.C.R. 84, holding an employer liable for the unauthorized discriminatory acts of its employees. It does not, on its face, render the employees and other representatives acting on their behalf free from personal liability.”

[61] The Tribunal went on at para. 50 of *Daley* to say that in considering an employer’s liability for the actions of an individual employee,

...the focus of the enquiry is properly on the purposes of the *Code*, and how they are most likely to be furthered. As explained in *Robichaud*, those purposes are predominantly remedial, and are aimed at eradicating the conditions which give rise to discrimination and at ameliorating its effects. In the employment context, this means that the employer, against whom meaningful remedies can be directed, and which has the capacity to itself remedy discrimination in the workplace, is liable for all acts of its employees in the course of their employment. In this connection, “in the course of their employment” is broadly interpreted to include any acts “being in some way related or associated with the employment”: *Robichaud* at para. 17.

[62] With regard to the Coworker’s alleged sexual assault of the Employee that took place in her home outside of working hours and outside of the workplace, I am persuaded that there is no reasonable prospect the Employee could succeed in establishing that it is deemed the conduct of the Employer. At para. 38 of *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795 [**Schrenk**], Rowe J. said that s. 13(1)(b) of the *Code* “prohibits discriminatory conduct that targets *employees* so long as that conduct has a sufficient nexus to the employment context.” He went on to say that a “contextual approach” was required to determine whether the alleged discriminatory conduct had a sufficient nexus to the employment context.

[63] The Employee's evidence is that the incident occurred outside of working hours, away from the worksite and Camp, in the context of a social visit. She did not tell the Employer of the event. Aside from the fact that the Employee and Coworker worked together, there is no other nexus between the circumstances and the employment context to be found in terms of arguing that the Employer could or should be deemed responsible for that act of the Coworker.

[64] Conversely, with respect to the incidents that took place in the workplace – at the Camp, on the Road, or in between, I am not persuaded that there is no reasonable prospect the Employee could succeed in establishing that the Employer is liable as having breached the *Code* by way of the Coworker's actions, should she establish that the alleged harassment and assault took place.

[65] Turning back to *Schrenk*, at paras. 43 and 44, Rowe J discussed "the unique vulnerability of the employment context" beyond an employee's economic dependence on their employer, wherein employees "are a captive audience to those who seek to discriminate against them". Here, the Employer controlled the Employee's schedule, to some extent her location, at times her living arrangement while in the Camp, and the people with whom she was surrounded, including the Coworker. The Employer's apparent argument that it cannot be liable for the actions of the Coworker appears to misunderstand the operation of the law. Obviously, as the Employer argues, sexual assault and harassment were not a part of the Coworker's duties. However, the Coworker's conduct did allegedly occur while he and the Employee were working together and residing in a Camp owned and operated by the Employer at which the Employer appears to have periodically required employees to reside.

[66] Turning then to *Moore*, it is not disputed that the Employee has the protected characteristic of sex. It is also not disputed that the Employee told the Employer that she had been sexually assaulted and harassed at work, and that she took time away from work and made a WorkSafeBC claim on that basis. These things, if proven, could amount to an adverse impact in employment, and the Employee has submitted evidence to support her claims including medical evidence, reference to her RCMP complaint, and her own affidavit evidence. Finally, given that the adverse impact flows directly from the allegations of sexual harassment,

nexus in turn flows should these facts be proven. In my view, based on the materials before me, the Employee has taken her complaint beyond the realm of conjecture.

[67] On the question of the alleged sexual assault and harassment that took place in the workplace, the Employer hinges its arguments on the idea that it cannot be liable for the Coworker's acts. I have addressed that above. Under the principles outlined in the caselaw above, if the Employee establishes at a hearing that the Coworker sexually assaulted or harassed her while at work or at the Camp, and that the conduct took place in the course of the Coworker's employment, the Employee would succeed in her complaint. The Employer has not persuaded me there is no reasonable prospect she could succeed in doing so. I decline to exercise my discretion to dismiss this part of her complaint under s. 27(1)(c).

B. Employer's response to the workplace harassment complaint

[68] Shifting to the Employer's response to the allegations of harassment and assault, in order for her complaint to succeed at a hearing, the Employee would have to establish that the Employer failed to provide a reasonable and appropriate response to her report of workplace sexual assault and harassment.

[69] In *Beharrell v. EVL Nursery*, 2018 BCHRT 62 [*Beharrell*], the Tribunal cited a decision from the Ontario Human Rights Tribunal that sets out helpful criteria for measuring the reasonableness of an Employer's response. At para. 21, the Tribunal said:

With respect to whether EVL's alleged failure discriminated against Ms. Beharrell on the basis of sex, the Tribunal has held that when an employee raises allegations of discrimination on the basis of a protected ground, an employer has an obligation to investigate the alleged discrimination: *Smyth v. Loblaw Companies*, 2017 BCHRT 73 (CanLII), para. 60; *Davis v. Western Star Trucks*, 2001 BCHRT 29 (CanLII), para. 94; *Ford v. Nipissing University*, 2011 HRTO 236 (CanLII), para. 56; *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII), para. 53. In *Laskowska*, the Ontario Human Rights Tribunal set out a helpful list of criteria against which the reasonableness of an employer's response may be measured:

The six criteria of corporate “reasonableness” in *Wall* have been adopted in previous decisions of the Board of Inquiry. I adopt a conflated version of them. The criteria are:

(1) Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training: Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;

(2) Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action: Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and

(3) Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication: Did the employer provide a reasonable resolution in the Circumstances? If the complainant chose to return to work, could the employer provide her/him with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?

While the above three elements are of a general nature, their application must retain some flexibility to take into account the unique facts of each case. The standard is one of reasonableness, not correctness or perfection. There may have been several options – all reasonable – open to the employer. The employer need not satisfy each element in every case in order to be judged to have acted reasonably, although that would be the exception rather than the norm. One must look at each element individually and then in the aggregate before passing judgment on whether the employer acted reasonably (paras. 59-60)

[70] When an employee raises allegations of discrimination on the basis of a protected ground, an employer has an obligation to investigate the complaint and to respond in a reasonable manner. The guiding principles set out above reflect a degree of proportionality that turns on the circumstances of each case. As such, the more serious the allegation, the more that will be required from an employer: *Beharrell* at para. 33.

[71] At issue here, then, is whether it is reasonably certain the Employer would establish that it acted reasonably after the Employee disclosed the alleged harassment and assault. The Employer argues that it did.

[72] The Employer asserts it acted “objectively reasonably” after the Employee’s allegations. It says that:

- It had policies in place and explained them to the Employee;
- It took the Employee’s allegations seriously and formulated a plan on how to proceed after she raised them on March 21, 2017;
- The Employee said the action was “fine” when followed up on and appeared “relaxed and well-adjusted”; and
- The GM’s approach was effective because after speaking with the Coworker on March 21, 2017, “there were no further incidents.”

The Employer argues that in the context of the above, it “did everything they could”.

[73] Given both parties cite *Beharrell*, I have considered the Employer’s arguments in the context of the framework set out above.

[74] With regard to the question of policies, notes from the April 14, 2017 meeting reflect that the OHS Manager said he did not talk about sexual harassment with the Employee during orientation and that he does not “spend too much time on the sexual-harassment with men because, I, I tried to cover a topic that’s actually going to be pertinent.” [as written] The Employer argues that while it may have been brief, it was discussed, and that as such male employees had heard about its zero-tolerance policy on sexual harassment. It argues that the fact the OHS Manager “may have tailored his discussions to the basics – ie. Harassment is prohibited and that he did not ‘spend too much time on it’ - does not belie that he did spend time on it and was able to communicate the core message that harassment was prohibited.” The Employer argues that the OHS Manager’s judgement “about how best to communicate a

message to the male employees should be respected; if [he] believes that a short clear message was more effective than belabouring the subject and potentially causing resentment or resulting in employees tuning out, then that is a reasonable decision.”

[75] While there may have been policies and procedures in place, I have no evidence before me that these were followed in this case – at least until WorkSafe BC got involved. The President’s response to the allegations appears to have been to end the conversation given the office was closing, instead of exploring the Employee’s allegations; and then to do nothing for at least for the ten days he says he heard nothing further about the allegations after speaking with the GM. The GM’s response appears to have been a casual conversation with the Coworker followed by a further assertion to the President that the Employee was in a relationship with the Coworker and was probably just angry about her equipment. If there are sexual harassment and assault policies or procedures in place, it is unclear to me whether any kind of process under those policies was actually engaged. It follows that the Employer’s reference to it having policies in place that were explained to everyone is not very helpful here.

[76] *Beharrell* also points to factors such as “Seriousness, Promptness, Taking Care of its Employee, Investigation and Action” in considering the reasonableness of the steps taken by an employer after issues of this nature come to light.

[77] The Employer says it took the Employee’s allegations seriously and formulated a plan on how to proceed after she raised them on March 21, 2017. However, the following is undisputed. The Employer spends little time on sexual harassment training in case male employees tune out or become resentful. When the Employee raised the allegations with the President, rather than asking her about them, he ended the meeting to close the office and assumed she was either trying to bolster her claims of favouritism or was jealous of another female in Camp receiving attention from the person she said had harassed her. When the Employee raised the allegations with the GM, his first response was to point to his belief of a consensual relationship between the Coworker and the Employee. The GM dismissed the Employee’s allegations in his call with the President, again asserting a consensual relationship and saying perhaps she was just angry about unrelated things. The GM’s only investigative step

appears to have been to casually speak with the Coworker about whether he had done what the Employee said. The GM said he would keep the Coworker away from the Employee but put them in contact the next day, only to later be confused about what the Coworker had to do with the Employee's discontent about driving an extra 4 hours in and out of Camp to avoid the Coworker. The Employer told the Employee during her leave that she would also have to work to avoid the Coworker – it was not all on him. On the Employee's first day back, the GM told her the situation was blown out of proportion, and the President was in Court to bring the Coworker back into Camp. Shortly thereafter, the Employer required the Employee to be out of Camp to facilitate the Coworker's return, and thereafter left her without a machine to work on for a week.

[78] The Employer points to the April 13, 2017 meeting to assert that it showed concern for the Employee's well-being and made a positive effort to assist her. "There is not a single request that [the Employee] made which [the Employer] refused", it asserts. The Employer says that on the Employee's return to work at the beginning of May 2017, it "indefatigably supported [the Employee]. It provided her the time she needed to heal. It constantly re-assured her that her job was waiting for her. It confirmed that and took steps to ensure that [the Coworker] would never come within 40 kms of her in the workplace." It says that this response "is even more commendable when considered in the context as a whole", wherein the Coworker denied any wrongdoing, maintained a right to silence as a result of the criminal investigation, and was constrained by both the criminal justice and WorkSafeBC processes. Even with these challenges, it says, it "still achieved a remarkable response to the allegations of sexual assault and harassment; [it] created a safe and supportive work environment in which [the Employee] was completely isolated and protected from [the Coworker]."

[79] What the Employer omits is that the 40km requirement arose from a court order that varied the Coworker's bail conditions at the Employer's request for the purpose of returning him to work. At the same time, there appears to have been little communication to the Employee as to *how* this would be achieved other than by keeping her out of Camp while the Coworker was there. In the meantime, the Employer reminded the Employee in effect that she

would have to avoid the Coworker and that the matter had been blown of proportion. The Employer also says little of the days of work the Employee says she lost to facilitate the Coworker's return to work or when she was without equipment to work on. There is, as I have said, little evidence of an investigation having been undertaken, concluded, or reported on to the Employee.

[80] The Employer next argues that every time it asked if the Employee was satisfied with her present situation, she said she was, and she appeared to be. The Employee may have said that she was fine with the GM's initial suggestion of keeping her and Coworker apart, but the GM did not follow through on this. She may have said, when asked in front of all of their colleagues, that she was fine with the Coworker assisting her with the grader, but her evidence is that she felt she had no choice but to allow him to, and that when asked after if everything was okay she thought the GM was referencing her grader. There is also evidence that the Employee communicated that she was not fine when she followed up with the President, stopped staying over in Camp citing the Coworker as the reason, and ultimately went off work sick.

[81] The Employer argues that it "had no reason to believe that the January 26 incident warranted further action on their part" because of the GM's "observations" of the Employee's "day to day demeanour". This is unpersuasive. Reliance on observations of the Employee's demeanour harkens to harmful stereotypes about the ideal sexual assault victim who can only be believed if visibly traumatized. The GM found the Employee walking down the road, prepared to quit, and she reported the assault and harassment as a reason. She followed up similarly with the President. She said she was uncomfortable staying in Camp, to the point that she added several hours of daily commute time to avoid the Coworker. Then she went on sick leave. The argument that there was no reason to believe that the January 26 incident required some follow up because of the GM's observations of the Employee's demeanour is a weak one.

[82] Finally, the Employer argues that the GM's approach was effective because after he spoke with the Coworker, there were no further incidents. I presume this to mean there were no further incidents of assault or harassment. While the Employer undoubtedly had an


obligation to ensure against future sexual assaults or harassment, the prevention of same does little to address the Employee's experience or enforce the Employer's "zero tolerance policy".

[83] Turning back, then, to the criteria outlined in *Beharrell*, it is undisputed that the Employer became aware of the Employee's allegations on March 21, 2017. There is very little evidence that there was a suitable anti-discrimination/harassment policy, a proper complaint mechanism, or adequate training given to management and employees. The evidence suggests that the Tribunal could find that in the days immediately following the Employee's March 21 disclosure, the Employer did little to seriously, promptly take care of the Employee, deal with the complaint promptly or sensitively, or reasonably investigate. Finally, it is not clear to me that the Tribunal would find that the Employer's compliance with the Coworker's bail conditions sufficed to provide the Employee with a reasonable resolution including a healthy, discrimination-free workplace.

[84] The Employer has fallen short of persuading me that this complaint has no reasonable prospect of success. I decline to exercise my discretion to dismiss this complaint.

IV CONCLUSION

[85] The application to dismiss the complaint is denied. The complaint will proceed.


Emily Ohler, Tribunal Member