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Assessing Sexually Harassing Conduct in the Workplace: An Analysis of BC Human Rights Tribunal Decisions in 2010–16

Bethany Hastie

C'est dans les années 1980 que le harcèlement sexuel au travail a d'abord été reconnu comme une forme de discrimination. Depuis lors, les concepts de harcèlement sexuel et de discrimination ont considérablement évolué. Le présent article examine comment les tribunaux des droits de la personne abordent les plaintes en matière de harcèlement sexuel au travail à la lumière d'une analyse de décisions rendues par le Tribunal des droits de la personne de la Colombie-Britannique, de 2010 à 2016. En observant la façon dont le tribunal détermine ce qui constitue le harcèlement sexuel, l'auteure suggère que, bien que les tribunaux des droits de la personne comprennent et analysent de mieux en mieux les plaintes de harcèlement sexuel, il subsiste des limites inhérentes à la nature individualiste de la loi anti-discrimination et aux principes juridiques régissant les plaintes de harcèlement sexuel.

Sexual harassment in the workplace was first recognized as a form of discrimination in the 1980s. Since that time, the concepts of sexual harassment and discrimination have evolved substantially. This article explores how human rights tribunals address complaints of sexual harassment in the workplace through a case analysis of BC Human Rights Tribunal decisions from 2010 to 2016. Focusing on an examination of how the tribunal determines what constitutes sexually harassing conduct, this article suggests that, while human rights tribunals are advancing in their understanding and analysis of sexual harassment claims, there remain inherent limitations associated with the individualized nature of anti-discrimination law and with the legal principles governing complaints of sexual harassment.

Introduction

The #MeToo movement has sparked renewed conversation, sensitivity, and momentum on the issue of workplace sexual harassment. In Canada, this movement follows investigations and inquiries concerning sexual misconduct and harassment in Canada, including in relation to the military and the Royal Canadian Mounted

Police.¹ These events illustrate the pervasiveness and seriousness of the issue of workplace sexual harassment, and increased legal action is expected to follow. Recent evidence from Ontario, for example, suggests that legal claims concerning sexual harassment and misconduct are increasingly being pursued through human rights tribunals.² Relaxed evidentiary standards, a less adversarial context, and higher compensatory awards are cited as key advantages of pursuing a claim of sexual harassment through a human rights tribunal. Yet very little contemporary research has evaluated the substance of sexual harassment laws and their application in the human rights context.³

A previous version of this article was presented at an emerging scholars workshop convened by the Institute for Feminist Legal Studies (Osgoode Hall Law School) and the *Canadian Journal of Women and the Law (CJWL)* on 22–23 September 2017 in Toronto, Ontario. I wish to thank the workshop participants, as well as Isabel Grant, for their helpful comments and feedback on the earlier draft, the research assistance of Hayden Cook in revising this article, and the anonymous reviewers for, and editors of, the *CJWL* for their feedback and helpful guidance throughout the review and publication process.

1. Marie Deschamps, “External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces” (27 March 2015), *Government of Canada* <<https://www.canada.ca/en/department-national-defence/corporate/reports-publications/sexual-misbehaviour/external-review-2015.html>>; Colin Perkel, “Landmark Deal in RCMP Sexual-Harassment Class Action Wins Court Approval”, *CBC News* (31 May 2017) <<http://www.cbc.ca/news/canada/british-columbia/rcmp-sexual-harassment-class-action-1.4140138>>; Canadian Press, “As Provinces Move to Ditch Heels in Sexist Dress Codes, Experts Say Servers Aren’t the Only Ones Stuck Tottering”, *National Post* (19 March 2017) <<http://nationalpost.com/news/canada/as-provinces-move-to-ditch-heels-in-sexist-dress-codes-experts-say-servers-arent-the-only-ones-stuck-tottering>>.
2. Sean Fine, “Ontario Human Rights Tribunal Gains Steam as Alternative Route for Sexual Assault Cases”, *Globe and Mail* (3 April 2018) <<https://www.theglobeandmail.com/canada/article-workplace-sexual-assault-survivors-claim-victory-at-human-rights/>>.
3. For existing scholarship on sexual harassment law in Canada, see e.g. Colleen Sheppard, “Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment” (1994–95) 3 *Canadian Labour and Employment Law Journal* 249 [Sheppard, “Systemic Inequality”]; Arjun P Aggarwal & Madhu M Gupta, *Sexual Harassment in the Workplace*, 3rd ed (Toronto: Butterworths, 2000); Fay Faraday, “Dealing with Sexual Harassment in the Workplace: The Promise and Limitations of Human Rights Discourse” (1994) 32:1 *Osgoode Hall Law Journal* 32; Kathleen Gallivan, “Sexual Harassment after Janzen v Platy: The Transformative Possibilities” (1991) 49 *University of Toronto Faculty of Law Review* 27; Sandy Welsh, Myrna Dawson & Elizabeth Griffiths, “Sexual Harassment Complaints to the Canadian Human Rights Commission”, *Government of Canada* <<http://publications.gc.ca/collections/Collection/SW21-43-1999E-5.pdf>>; Susan M Hart, “Labour Arbitration of Co-Worker Sexual Harassment Cases in Canada” (2012) 29:2 *Canadian Journal of Administrative Sciences* 268; Sheryl L Johnson, *Sexual Harassment in Canada: A Guide for Understanding and Prevention* (Toronto: Lexis Nexis Canada, 2017).

The definition of sexual harassment was set out first by the Supreme Court of Canada in the 1989 decision in *Janzen v Platy Enterprises*: “[S]exual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.”⁴ Importantly, *Janzen* recognized explicitly that sexual harassment is a form of sex discrimination, making it “reflective of a more contextualized and systemic approach that requires connecting the individual experience of the woman being harassed to the collective experiences and condition of women as a group.”⁵ Since that time, numerous legal cases have come before courts and tribunals, though, as noted by Constance Backhouse, these legal cases and victories have not been without obstacles, problems, and setbacks.⁶

As mentioned above, limited contemporary research exists that evaluates whether, and to what extent, human rights tribunals offer an effective vehicle for sexual harassment complaints.⁷ Given the complexity and subtlety with which sexual harassment in the workplace might unfold, coupled with the historical problems noted by Backhouse, it is important to examine how human rights tribunals understand and interpret the law of sexual harassment in their substantive decisions and to consider whether, and to what extent, they provide an effective remedial option for complainants.

This article is part of a larger project that aims to contribute to such an examination through a case analysis of BC Human Rights Tribunal (BCHRT) decisions from 2010 to 2016 concerning complaints of sexual harassment in employment settings. This article focuses particularly on how sexually harassing conduct is defined and understood.⁸ Specifically, I outline the characteristics of the identified cases and engage in a qualitative analysis of the cases in relation to three key themes: evaluating the threshold of sexually harassing conduct; evaluating the impact of relational dynamics in assessing conduct; and evaluating the impact of the broader workplace environment in assessing conduct. Through this article, I aim to provide a rich descriptive foundation for further research moving forward.

4. *Janzen v Platy Enterprises*, [1989] 1 SCR 1252 [*Janzen*].

5. Sheppard, “Systemic Inequality”, *supra* note 3 at 256.

6. Constance Backhouse, “Sexual Harassment: A Feminist Phrase That Transformed the Workplace” (2012) 24:2 *Canadian Journal of Women and the Law* 275 at 297–98. For commentary on continued challenges complainants face pursuing sexual harassment claims through legal vehicles, see also Aggarwal & Gupta, *supra* note 3.

7. Sheppard, “Systemic Inequality”, *supra* note 3; Aggarwal & Gupta, *supra* note 3; Faraday *supra* note 3; Gallivan *supra* note 3; Welsh, Dawson & Griffith *supra* note 3; Hart *supra* note 3; and Johnson *supra* note 3.

8. A second article examining the requirement that conduct be “unwelcome” is forthcoming in the *Canadian Journal of Women and the Law* (2020).

British Columbia is currently one of only two jurisdictions in Canada without a Human Rights Commission,⁹ mandated to engage in public education and awareness on human rights and discrimination, including in the workplace. The lack of a commission dedicated to preventing discrimination, engaging in education building, and developing guidelines and policy has been found to have created a “gaping hole in the province’s system of human rights protection.”¹⁰ The forthcoming reinstatement of the BC Human Rights Commission may benefit from increased information and analysis of human rights complaints and discrimination in the province, including sexual harassment claims, in order to inform its future work.¹¹ Further, unlike other jurisdictions, British Columbia’s *Human Rights Code* does not contain specific provisions related to sexual harassment, instead subsuming this under the broader category of “sex discrimination.”¹² Whether this broader wording, as opposed to more specific language, impacts the adjudication of sexual harassment claims has not yet been explored; this article sets the stage for further research in that regard and at a time when workplace sexual harassment issues are receiving intensified attention across Canada.¹³ Together, these factors create a context ripe for engagement in understanding how the BCHRT encounters and addresses sexual harassment claims. The case selection for this article is limited to substantive decisions on the merits published between 2010 and 2016. While sexual harassment, as a legal concept, dates back to the 1970s,¹⁴ the sample chosen for this article focuses on current trends and conceptualizations by the BCHRT concerning sexual harassment in the

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9. Kaitlyn Matulewicz, “Law and the Construction of Institutionalized Sexual Harassment in Restaurants” (2015) 30:3 *Canadian Journal of Law and Society* 401 at 408.
 10. *Ibid.*, citing Gwen Brodsky & Shelagh Day, *Strengthening Human Rights: Why British Columbia Needs a Human Rights Commission* (Vancouver: Poverty and Human Rights Centre and Canadian Centre for Policy Alternatives, 2014) <<https://www.policyalternatives.ca/publications/reports/strengthening-human-rights>>. Human rights commissions in Canada have historically played a significant role in defining and providing guidelines on sexual harassment. See Aggarwal & Gupta, *supra* note 3 at 12–13; Ontario Human Rights Commission, “OHRC Policy Position on Sexualized and Gender-Specific Dress Codes” <<http://www.ohrc.on.ca/en/ohrc-policy-position-sexualized-and-gender-specific-dress-codes>>.
 11. Regarding the reinstatement of the BC Human Rights Commission (BCHRT), see Office of the Premier, “B.C. to Fight Inequality and Discrimination with Renewed Human Rights Commission” (4 August 2017), *Government of British Columbia* <<https://news.gov.bc.ca/releases/2017PREM0069-001392>>.
 12. RSB 1996, c 210. *Cf Human Rights Code*, RSO 1990, c H 19, s 7 (which specifically prohibits sexual harassment). See Aggarwal & Gupta, *supra* note 3 at 56.
 13. Deschamps, *supra* note 1; Perkel, *supra* note 1; Canadian Press, *supra* note 1.
 14. Constance Backhouse & Leah Cohen, *The Secret Oppression: Sexual Harassment of Working Women* (Toronto: Macmillan, 1978); Carrie N Baker, *The Women’s Movement against Sexual Harassment* (New York: Cambridge University Press, 2008).

workplace, while providing a sample size feasible for a deeper qualitative analysis of decisions.¹⁵

This article proceeds in five parts. The first section reviews the legal principles attending complaints of sexual harassment as a form of discrimination and the existing scholarship that has commented upon these principles. The second section provides an overview of the characteristics of the identified cases, such as the gender and occupation of the complainant, industry of work, and relationship to the alleged harasser, and briefly describes how these characteristics map onto known trends and issues regarding sexual harassment in the workplace. The third, fourth, and fifth sections engage in a qualitative analysis of the decisions, focusing on the interpretation and application of the legal principles establishing conduct as sexual harassment and discussing limitations and problems arising in cases where conduct was determined not to constitute sexual harassment. As this article will suggest, though an important piece of overall response, human rights tribunals remain limited in their ability to fully understand and respond to the systemic and subtle ways in which sexual harassment in the workplace may unfold.

Sexual Harassment as Employment Discrimination: Legal Principles

As mentioned in the introduction, sexual harassment as a form of employment discrimination was defined by the Supreme Court of Canada in *Janzen v Platy Enterprises*, though it was not the first legal decision to consider such claims.¹⁶ Still, *Janzen* remains widely referred to in contemporary decisions for the wide-ranging definition of sexual harassment that it sets out. To establish a successful case of discrimination on the basis of sexual harassment, a complainant must prove, on a balance of probabilities, that the conduct in question occurred (and falls within the legal understanding of sexual harassment) and that the conduct was “unwelcome.”¹⁷ The conduct does not have to be intentional, but it must have the effect of creating an adverse impact on the complainant’s working conditions or environment.

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15. A longitudinal study on the evolution of the legal conceptualization of sexual harassment, and the inclusion of cases dismissed in preliminary proceedings, would add further depth to the findings of this article, as would a comparative study of several provincial human rights tribunals. Although beyond the scope of this article, such studies are planned to follow.
 16. Backhouse, *supra* note 6 at 296–97, which concerns cases that preceded *Janzen*. See also Aggarwal & Gupta, *supra* note 3 at 44–56, for a review of the development of sexual harassment law and legal cases in Canada; Janine Benedet, “Pornography as Sexual Harassment” in Catherine McKinnon, ed, *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004) 417 at 418–20 [Benedet, “Pornography”].
 17. *Mahmoodi v UBC and Dutton*, 1999 BCHRT 56 at paras 140–41 [*Mahmoodi*].

The BCHRT, in *Mahmoodi v University of British Columbia and Dutton*,¹⁸ confirmed that conduct falling within the definition of sexual harassment may be physical or psychological, overt or subtle, and may include verbal innuendoes, affectionate gestures, repeated social invitations, and unwelcome flirting, in addition to more blatant conduct such as leering, grabbing, or sexual assault.¹⁹ The delineation of conduct in *Mahmoodi* reflects an understanding of the “range of practices [that] can create a hostile environment[,]”²⁰ including verbal, visual, and physical harassment.

Verbal sexual harassment may take the form of sexual innuendo, taunts, jokes, and comments about a woman’s appearance or sexual habits. It may include derogatory name-calling. Sexual invitations or requests, whether direct or indirect, threatening or joking, may also be harassment. Displaying pornographic, derogatory, or sexually explicit photographs or other materials falls into the category of visual sexual harassment, as do sexually explicit or suggestive gestures. And physical sexual harassment encompasses unnecessary touching, including physical and sexual assault.²¹

Expanding the type of conduct captured within the definition of sexual harassment works towards addressing sexual harassment as a form of sex inequality by recognizing the myriad ways in which harassment can pose “a barrier to women’s equal participation in employment.”²² This definition further reflects the movement away from a narrow understanding of sexual harassment as “*quid pro quo*” sexual advances towards a broader conceptualization of the ways in which women experience adverse working conditions and treatment due to their sex.²³ This is a positive development, given that subtle forms of sexual harassment have historically been viewed as a normalized aspect of certain workplaces and relationships.²⁴ However, determining when conduct amounts to sexual harassment has remained an issue for tribunals.²⁵

18. *Ibid.*

19. *Ibid* at paras 135–36, citing *Janzen*, *supra* note 4; Arjun P Aggarwal, *Sexual Harassment in the Workplace* (Toronto: Butterworths, 1987). For a detailed list of the various behaviours that may constitute sexual harassment, see Aggarwal & Gupta, *supra* note 3 at 14–18. For a critical perspective on the definition of sexual harassment, see Gallivan, *supra* note 3.

20. Gallivan, *supra* note 3 at 30.

21. *Ibid.*

22. *Ibid* at 29. See also Vicki Schultz, “Reconceptualizing Sexual Harassment” (1998) 107:6 *Yale Law Journal* 1683.

23. Backhouse, *supra* note 6 at 295; Gallivan, *supra* note 3 at 30, citing Catherine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven, CT: Yale University Press, 1979); Schultz, *supra* note 22.

24. Matulewicz, *supra* note 9 at 402; Aggarwal & Gupta, *supra* note 3 at 11; Faraday, *supra* note 3 at 37. For a review and debates of developments in the US context, see Catherine A MacKinnon & Reva B Siegel, eds, *Directions in Sexual Harassment Law* (New Haven, CT: Yale University Press, 2004).

25. Aggarwal & Gupta, *supra* note 3 at 119–20; Faraday, *supra* note 3 at 40–41.

Despite an expanded definition, the legal assessment of sexual harassment complaints has been critiqued for the limitations associated with its individualized approach and for its failure to fully incorporate the progress made in anti-discrimination law, generally, in accounting for systemic discrimination.²⁶ The “individualized dimensions of law’s conception of sexual harassment have prevailed over a more systemic understanding” of this phenomenon, a critique that was initially raised by early legal feminists who connected sexual harassment to broader constructions of “masculinity, socialization processes, and gendered hierarchies of material and social power.”²⁷ Despite inroads made in understanding the myriad ways in which sexual harassment in the workplace unfolds, and the changing norms and expectations concerning workplace relationships and gendered dimensions of work, this critique continues to bear relevance today. The individualized understanding of sexual harassment as perpetrated by a sole “bad actor” may displace the broader context in which workplace sexual harassment exists and do little to shift institutional expectations and norms.²⁸ The focus on individualization also deflects attention from examining how general working conditions and workplace environments may foster or constitute sexual harassment.²⁹ Relatedly, this focus may stifle a deeper conversation and acknowledgement of the role that law, policy, and other social forces play in fostering conditions in which sexual harassment may occur. Finally, the individualized and categorized approach to sexual harassment claims does not appear to appreciate or account for the intersectional nature of discrimination.

The following sections will examine a body of case law from the BCHRT, with a view to understanding how these cases map onto, or diverge from, the identified critiques and problems.

Sexual Harassment Claims at the BCHRT: Characteristics

As discussed in the introduction, this article examines substantive decisions on the merits for workplace sexual harassment complaints at the BCHRT from 2010 to 2016. While this analysis provides an opportunity to examine the substantive interpretation

26. Sheppard, “Systemic Inequality”, *supra* note 3 at 258–59.

27. Matulewicz, *supra* note 9 at 403, citing Hester Lessard, “Backlash in the Academy: The Evolution of Campus Sexual Harassment Regimes” in Dorothy E Chunn, Susan Boyd & Hester Lessard, eds, *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver: UBC Press, 2007) 164 at 169; Backhouse & Cohen, *supra* note 14 at 38–52; Baker, *supra* note 14. For an analysis of the power dimensions associated with sexual harassment, see Gallivan, *supra* note 3; Faraday, *supra* note 3 at 49–50.

28. Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal and Kingston: McGill-Queen’s University Press, 2010) [Sheppard, *Inclusive Equality*]; Sheppard, “Systemic Inequality”, *supra* note 3 at 256–57.

29. Sheppard, “Systemic Inequality”, *supra* note 3 at 256–59; Schultz, *supra* note 22.

and application of the law of sexual harassment, there are limitations to this inquiry. First, many complaints will be settled prior to a full hearing and decision on the merits or dismissed at a preliminary stage. Moreover, many instances of sexual harassment are simply not reported. Complainants of sexual harassment may perceive significant disincentives to pursue legal claims³⁰ or to report harassment in the workplace, including a belief that nothing will be done, that the incident will be treated lightly or ridiculed, or that the complainant will be blamed or suffer repercussions.³¹ As such, the body of cases forming the analysis in this article cannot be said to be exhaustive or fully illustrative of how the law encounters sexual harassment in its specific and varied forms.

Eighteen decisions on the merits concerning complaints of sexual harassment in employment settings were identified in a search of BCHRT decisions from 2010 to 2016:³² seven in 2010;³³ three in 2011,³⁴ one in 2012;³⁵ five in 2013;³⁶ one in 2014;³⁷ one in 2015;³⁸ and zero in 2016. Of the identified cases, three complaints were dismissed because the complainant did not attend the hearing.³⁹ Of the remaining fifteen decisions that followed from a hearing on the merits, eleven complaints were found justified, while four complaints were dismissed.⁴⁰ This section describes the characteristics of these fifteen complaints with substantive decisions on the merits, including in relation to: the gender of the complainants and individual respondents; the employment

30. Hart, *supra* note 3 at 274.

31. Johnson, *supra* note 3 at 195.

32. Under the *Human Rights Code*, *supra* note 12, s 13 (discrimination in employment).

33. *LaBelle v Campus Technologies and Another*, 2010 BCHRT 116 [*LaBelle*]; *Ratzlaff v Marpaul Construction and Another*, 2010 BCHRT 13 [*Ratzlaff*]; *Tyler v Robnik and Mobility World (No 2)*, 2010 BCHRT 192 [*Tyler*]; *Soroka v Dave's Custom Metal Works and Others*, 2010 BCHRT 239 [*Soroka*]; *Skorka v Happy Day Inn and Others*, 2010 BCHRT 306 [*Skorka*]; *Wideman v Wiebe and Another (No 2)*, 2010 BCHRT 312 [*Wideman*]; *Heyman v Saunders (No 2)*, 2010 BCHRT 88 [*Heyman*].

34. *Kang v Hill and Another (No 2)*, 2011 BCHRT 154 [*Kang*]; *Young and Young on Behalf of Young v Petres*, 2011 BCHRT 38 [*Young*]; *McIntosh v Metro Aluminum Products and Another*, 2011 BCHRT 34 [*McIntosh*].

35. *Q v Wild Log Homes and Another*, 2012 BCHRT 135 [*Q*].

36. *MacDonald v Najafi and Another (No 2)*, 2013 BCHRT 13 [*MacDonald*]; *Root v Ray Ray's Beach Club and Others*, 2013 BCHRT 143 [*Root*]; *Paananen v Scheller (No 2)*, 2013 BCHRT 257 [*Paananen*]; *Sleightholm v Metrin and Another (No 3)*, 2013 BCHRT 75 [*Sleightholm*]; *Kuchta v J Lanes Enterprises and Others*, 2013 BCHRT 88 [*Kuchta*].

37. *Balikama Obo Others v Khaira Enterprises and Others*, 2014 BCHRT 107 [*Balikama Obo*].

38. *PN v FR and Another (No 2)*, 2015 BCHRT 60 [*PN*].

39. *LaBelle*, *supra* note 33; *Skorka*, *supra* note 33; *Heyman*, *supra* note 33.

40. Complaints were dismissed after a consideration of the merits in the following cases: *Wideman*, *supra* note 33; *Kang*, *supra* note 34; *Sleightholm*, *supra* note 36; *Kuchta*, *supra* note 36.

relationship between the complainant and respondent; and the job and industry of work. As this section will establish, the characteristics of the identified complaints largely map onto dominant trends concerning workplace sexual harassment.⁴¹

Sexual harassment has long been recognized as a tactic used by male supervisors and co-workers to push women out of the workplace.⁴² Despite significant progress since the movement against sexual harassment began in the 1970s, it remains an enduring issue today. A 2014 Angus Reid poll found that 43 percent of women in Canada reported experiencing sexual harassment in their workplace, compared to 12 percent of men.⁴³ This bears a direct connection to the history of sex inequality in employment and the ways in which sexual harassment is a manifestation of that inequality.⁴⁴ The gendered dimensions of workplace sexual harassment in the identified cases closely mirrored these general statistics and known trends. In the identified cases, all of the complaints, but one, were brought by women.⁴⁵ The alleged harassers in all fifteen substantive decisions were male. These characteristics exemplify existing research findings that women are subject to sexual harassment at work far more often than men.

Sexual harassment complaints tend to arise in industries and jobs that are service oriented, where women occupy a historically gendered and subordinated role or where women are engaged in jobs that are historically male dominated.⁴⁶ These

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41. Certain characteristics, such as race and age, were not consistently identified in the decisions. This is troubling given the often-intersectional nature of discrimination, as mentioned in the previous section. As such, the characteristics discussed in this section are limited to those explicitly acknowledged in the identified cases.
 42. Baker, *supra* note 14 at 4–5; Backhouse, *supra* note 6 at 295; Gallivan, *supra* note 3 at 28.
 43. Angus Reid Institute, “Three-in-Ten Canadians Say They’ve Been Sexually Harassed at Work, but Very Few Have Reported This to Their Employers” (5 December 2014) <<http://angusreid.org/wp-content/uploads/2014/12/2014.12.05-Sexual-Harassment-at-work.pdf>>; Aggarwal & Gupta, *supra* note 3 at 1.
 44. Backhouse & Cohen, *supra* note 14; Baker, *supra* note 14; Sheppard, “Systemic Inequality”, *supra* note 3; Kathryn Abrams, “The New Jurisprudence of Sexual Harassment” (1998) 83:5 *Cornell Law Review* 1169.
 45. *Heyman*, *supra* note 33 (complaint was brought by a male employee but dismissed because he did not attend the hearing).
 46. Backhouse, *supra* note 6; Faraday, *supra* note 3; Judy Fudge, “Rungs on the Labour Law Ladder: Using Gender to Challenge Hierarchy” (1996) 60:2 *Saskatchewan Law Review* 237; Baker, *supra* note 14; Sheppard, “Systemic Inequality”, *supra* note 3 at 267–72; Elizabeth Kristen, Blanca Banuelos & Daniela Urbant, “Workplace Violence and Harassment of Low-Wage Workers” (2015) 36:1 *Berkeley Journal of Employment and Labour Law* 169, citing Deborah L Rhode, “Sexual Harassment” (1992) 65:3 *Southern California Law Review* 1459 at 1461. See also Aggarwal & Gupta, *supra* note 3 at 1 (noting that sexual harassment is “not confined to any one level, class, or profession” but that, for example, “the Ontario Human Rights Commission complaints show that 65 percent of all sexual harassment cases involve waitresses, clerks, secretaries, receptions, and other low-ranking service jobs” (*ibid*)).

trends are illustrative of the underlying issues concerning the gendered dimensions of workplace sexual harassment and demonstrate how sexual harassment is used as a tactic to entrench sex inequality in the workplace and to push women out of workplaces thought to be traditionally “male oriented.” Finally, these trends further reflect the structural inequality that attends women’s positions in the workplace and the impact that this has on experiences of sexual harassment.⁴⁷

The industries and jobs in which complainants in the identified cases worked map onto these existing trends. In six cases, complainants worked in office administration, such as in clerical roles or junior departmental roles (for example, communications coordinator), in various office settings.⁴⁸ These types of job roles were historically identified as “women’s work,” given their subordinated, and often supportive, status in offices and have been the subject of commentary and research regarding their connection with sexual harassment.⁴⁹ Five of the complainants performed service-related work, which has similarly been noted as facilitating sexual harassment and other forms of sex discrimination, often accompanied by the presence of a sexualized work environment, such as in the restaurant industry.⁵⁰ These included jobs in restaurants and other food services, caregiving, and retail.⁵¹ As with administrative job roles, service jobs present women at work in a supportive, servile, and subordinated capacity and, sometimes, as sexualized objects.⁵² Finally, a total of four complaints arose from women performing work in historically male-dominated jobs and industries: three complaints arose from women performing work in the construction and trades industry⁵³ and one complaint from

47. Sheppard, “Systemic Inequality”, *supra* note 3 at 267–72; Schultz, *supra* note 22.

48. *Wideman*, *supra* note 33; *Kuchta*, *supra* note 36; *Q*, *supra* note 35; *Kang*, *supra* note 34; *MacDonald*, *supra* note 36; *Sleightholm*, *supra* note 36.

49. *Backhouse*, *supra* note 6; *Aggarwal & Gupta*, *supra* note 3 at 1; Sheppard, “Systemic Inequality”, *supra* note 3 at 274; *Matulewicz*, *supra* note 9, citing Jackie Krasas Rogers & Kevin D Henson, “‘Hey, Why Don’t You Wear a Shorter Skirt?’ Structural Vulnerability and the Organization of Sexual Harassment in Temporary Clerical Employment” (1997) 11:2 *Gender and Society* 215.

50. *Matulewicz*, *supra* note 9, citing Eleanor LaPointe, “Relationships with Waitresses: Gendered Social Distance in Restaurant Hierarchies” (1992) 15:4 *Qualitative Sociology* 377; Anthony D LaMontagne et al, “Unwanted Sexual Advances at Work: Variations by Employment Arrangement in a Sample of Working Australians” (2009) 3:2 *Australian and New Zealand Journal of Public Health* 173; Anne C McGinley, “Harassing Girls at the Hard Rock: Masculinities in Sexualized Environments” (2007) 27:4 *University of Illinois Law Review* 1229; Sheppard, “Systemic Inequality”, *supra* note 3 at 275.

51. *Root*, *supra* note 36 (restaurant); *Young*, *supra* note 34 (food services); *Paananen*, *supra* note 36 (food services); *Tyler*, *supra* note 33 (retail); *PN*, *supra* note 38 (caregiving).

52. *Matulewicz*, *supra* note 9 (discussing this issue in the restaurant industry).

53. *Ratzlaff*, *supra* note 33; *Soroka*, *supra* note 33; *McIntosh*, *supra* note 34.

work in silviculture.⁵⁴ Women entering jobs traditionally held by men, especially in trades and resource industries, historically experienced sexual harassment as a form of hostility in entering “non-traditional” workplaces.⁵⁵ The presence and isolation of women in a male-dominated workplace further “constitutes a structural source of vulnerability to sexual harassment.”⁵⁶

As noted in existing literature,⁵⁷ power is a driving force behind sexual harassment, and the relational dynamics attending workplace sexual harassment have been linked to this notion of power, whether through formal authority, as in the case of a supervisor, or through an informal assertion of authority, as in the case of a co-worker. Power dynamics in the employment relationship figured prominently in the identified cases. Substantially more complaints arose against supervisors than co-workers: two complaints related to co-workers⁵⁸ and thirteen to supervisors or individuals occupying a position of authority (such as the business owner). Power dynamics attending the employment relationship must also be understood in light of the fact that often, as in all of the identified cases here, the supervisor is male and the subordinate is female. Thus, the power held by the male supervisor also serves to entrench the inequality and subordination of the female worker, who may be discouraged from voicing a complaint for fear of reprisal or retaliation.⁵⁹

As noted in the first section, sexual harassment law has moved from a narrow understanding of “*quid pro quo*” sexual advances to a broader conceptualization of the myriad ways in which sexually harassing conduct seeks to undermine women’s equality in the workplace, through both subtle conduct such as sexual innuendo and jokes and through the creation of hostile working conditions.⁶⁰ The particular conduct constituting sexual harassment in the identified cases was varied and encompassed a wide range of conduct that constitutes sexual harassment. Conduct ranged from overt and physical actions to more subtle forms of conduct such as jokes, innuendo, and romantic invitations. Seven of the eleven justified complaints involved physical touching, such as slapping or pinching a complainant’s bottom, grabbing a complainant, kissing, hugging, and touching a complainant’s breasts.⁶¹ Verbal

54. *Balikama Obo*, *supra* note 37.

55. Baker, *supra* note 14 at 4.

56. Sheppard, “Systemic Inequality”, *supra* note 3 at 271.

57. Backhouse & Cohen, *supra* note 14; Matulewicz, *supra* note 9; Gallivan, *supra* note 3 at 31–34.

58. Soroka, *supra* note 33; Ratzlaff, *supra* note 33; Matulewicz, *supra* note 9.

59. Gallivan, *supra* note 3 at 35–36.

60. Backhouse, *supra* note 6 at 295; Gallivan, *supra* note 3 at 28–30. However, as Gallivan notes, instances of physical touching are more widely accepted as meeting the threshold for sexually harassing conduct, whereas non-sexual and non-physical conduct is often subject to greater scrutiny (*ibid* at 40–43). Faraday, *supra* note 3 at 43.

61. Ratzlaff, *supra* note 33; Tyler, *supra* note 33; *Q*, *supra* note 35; *Root*, *supra* note 36; *Paananen*, *supra* note 36; *Young*, *supra* note 34; *PN*, *supra* note 38.

conduct included sexual innuendo and jokes as well as demeaning and denigrating comments related to the complainant's sex.⁶² In five of the identified complaints, sexual invitations or propositions were made by the respondent.⁶³ In several cases, persistent verbal conduct escalated to include physical touching.⁶⁴ In addition, cases involving verbal harassment were "persistent" in nature, meaning that the complaint detailed multiple, ongoing instances of such harassment rather than a single incident.⁶⁵ The range of conduct documented in the identified cases illustrates the varied and wide-ranging nature of sexually harassing conduct that continues to endure in contemporary workplaces. A more detailed discussion of the conduct identified in the cases follows in the next section.

Sexual Harassment Claims at the BCHRT: Analyzing the Conduct Element in Justified Complaints

As noted above, sexually harassing conduct includes a wide range of speech and actions, both physical and verbal, overt and subtle. This section engages in a qualitative analysis of the identified cases in order to gain a more detailed understanding of how the BCHRT understands and assesses this potentially wide range of conduct as sexual harassment. This section analyzes cases where the conduct in question was found to constitute sexual harassment, though, as the next sections will outline, we may learn much more about the conduct threshold from the cases where this was not met.

Many of the identified cases involved blatant sexually harassing conduct, especially physical touching, such as poking breasts, slapping or pinching bottoms, and more serious conduct.⁶⁶ An important theme cutting across the cases is the sexual nature of the conduct itself; rather than only being targeted at the complainant's sex, the conduct in question in most of the successful cases was itself sexualized. For example, in *Q v Wild Log Homes and Another*, the complainant endured several instances of unwanted physical touching from her boss, including poking her breasts

62. Regarding demeaning comments, see especially *MacDonald*, *supra* note 36; *Balikama Obo*, *supra* note 37.

63. *Ratzlaff*, *supra* note 33; *Tyler*, *supra* note 33; *Soroka*, *supra* note 33; *McIntosh*, *supra* note 34; *Q*, *supra* note 35.

64. *Ratzlaff*, *supra* note 33; *Tyler*, *supra* note 33; *Q*, *supra* note 35.

65. *Tyler*, *supra* note 33; *McIntosh*, *supra* note 34; *MacDonald*, *supra* note 36; *Q*, *supra* note 35; *Ratzlaff*, *supra* note 33; *Soroka*, *supra* note 33. The "persistence" factor has been especially significant in recognizing situations of verbal sexual harassment. *Faraday*, *supra* note 3 at 43.

66. *Paananen*, *supra* note 36; *Root*, *supra* note 36; *Ratzlaff*, *supra* note 33; *Young*, *supra* note 34; *Tyler*, *supra* note 33; *Q*, *supra* note 35; *PN*, *supra* note 38. For a discussion of trends concerning sexual conduct and the threshold of sexual harassment, see *Faraday*, *supra* note 3 at 47.

and grabbing her buttocks as well as verbal harassment in the form of inquiring about her love life and professing feelings for her in emails and in conversations.⁶⁷

In these cases, the BCHRT's analysis tended to be rather succinct, and it was often simply stated that such conduct constituted harassment in line with the definition set out in *Janzen*.⁶⁸ For example, in *Q*, the tribunal member determined that

the impugned conduct is demonstrative of the very type of situation that the *Code's* prohibition on sexual harassment is designed to prevent. Mr. Walker was in a position of authority over Q. He used his business, and her economic vulnerability within the employment relationship, to further his personal, romantic interests towards her and to "take liberties" with her. This had a detrimental effect on her work environment.⁶⁹

Indeed, the overt and sexual nature of the conduct at issue in most of the identified cases precluded the need for a detailed analysis on the conduct question.⁷⁰

Respondents in some cases attempted to minimize their conduct, such as by characterizing it as a "joke" or light-hearted, thus suggesting that it was not the kind of conduct defined as sexual harassment. However, these characterizations were not accepted by the tribunal members, often due to the overt sexual nature of the conduct in question. For example, in *Tyler v Robnik*, the tribunal member concluded that "[i]t is difficult to imagine how Mr. Robnik, Mobility's district manager, offering his hotel room key to a subordinate female employee could be viewed as simply a joke."⁷¹ In several cases, there were also clear indicia and findings of fact that the complainant communicated, or attempted to communicate, that the conduct in question was not welcome nor were the feelings reciprocated, further supporting a finding that such conduct constituted harassment.⁷² In other words, in most cases, the complainant actively protested the conduct.

67. *Q*, *supra* note 35 at paras 62–112 (summary of evidence), 138 (summary of the complainant's specific allegations of sexual harassment).

68. *Ratzlaff*, *supra* note 33 at para 26; *Tyler*, *supra* note 33 at para 58; *Soroka*, *supra* note 33 at paras 73–74; *Young*, *supra* note 34 at para 56; *Root*, *supra* note 36 at para 38; *Paananen*, *supra* note 36 at para 78; *McIntosh*, *supra* note 34 at para 133; *Q*, *supra* note 35 at paras 149–50.

69. *Q*, *supra* note 35 at para 147.

70. This comports with Gallivan's findings that instances of physical touching and blatant sexual conduct are more readily accepted as meeting the threshold requirements for sexually harassing conduct. Gallivan, *supra* note 3 at 40–43.

71. *Tyler*, *supra* note 33 at para 49.

72. *Soroka*, *supra* note 33 at para 73; *Young*, *supra* note 34 at para 25; *Q*, *supra* note 35; *Ratzlaff*, *supra* note 33; *McIntosh*, *supra* note 34. Note that, while these findings relate to the "unwelcome" requirement (which will be subsequently explored in a second article), some overlap existed in tribunal members' analyses of sexual harassment claims and that protestation or similar behaviour on the part of the complainant tended to support a finding that the conduct constituted harassment, particularly given that most cases involved persistent conduct.

Contrary to the dominant thread of verbal sexual harassment as overtly sexualized in nature (that is, sexual invitations, propositions and innuendo, or physical touching), one case in the identified set centred on demeaning language and commentary directed at the complainant's sex. While this might be readily understood as sex discrimination, the tribunal member in this case framed the issue as one of sexual harassment, potentially widening the definition of workplace sexual harassment beyond conduct that is sexualized in nature.⁷³

In *MacDonald v Najafi and Another (No 2)*, the complainant, Ms. MacDonald, worked as a graphic designer at a small business in Vancouver. Other than the owner's wife, she was the only female employee at the time.⁷⁴ MacDonald filed a human rights complaint against the company and its owner—her supervisor—for discrimination on the basis of sex and marital status.⁷⁵ The basis of her complaint concerned verbal conduct that was demeaning and targeted towards her sex, including whistling at her to come “like a dog,”⁷⁶ commenting that she “needed a man,”⁷⁷ “chastising” her for not being married,⁷⁸ and making comments about her appearance.⁷⁹ In his analysis, the tribunal member framed the issue around sexual harassment, citing the definition from *Janzen*.⁸⁰ However, the tribunal member noted that the complainant was not required to establish that the respondent's conduct was “sexual,” only that “he treated her adversely in connection with her employment . . . at least in part because she was a woman.”⁸¹ While not expressly stated in the decision, it could be that the tribunal member focused on the broader category of sex discrimination, even if the complaint was framed as one of sexual harassment. Alternatively, the tribunal member may have understood that sexual harassment encompasses numerous types of conduct, not only those that sexualize the complainant. This may have positive implications for broadening the concept of sexual harassment in the workplace from one that focuses more narrowly on sexual invitations, propositions, touching, and innuendo to a broad array of conduct that discriminates against, demeans, and objectifies women. Such a broadened understanding, in turn, may have benefits for

73. Faraday, *supra* note 3 at 48, discussing another case (*Shaw v Levac Supply Ltd.*, (1990), 14 CHRR D/36 (Ont Bd Inq)) that similarly made “creative use of the principles to expand the realm of behaviour characterizable as sexual harassment” (Faraday, *supra* note 3). For broader arguments concerning the intersection of sexualisation and sexual harassment, see Schultz, *supra* note 22.

74. *MacDonald*, *supra* note 36 at para 13.

75. *Ibid* at para 1.

76. *Ibid* at paras 9, 25–27.

77. *Ibid* at para 17.

78. *Ibid* at para 19.

79. *Ibid* at paras 36–38.

80. *Ibid* at paras 63–64.

81. *Ibid* at para 65.

advancing the equality of women in the workplace by properly naming the myriad ways in which they experience inequality through discriminatory conduct and may shed greater light on institutionalized aspects or forms of sexual harassment as discrimination.

Overall, despite the expanded definition of sexual harassment and the broad array of conduct potentially set out within it, justified complaints, as described in this section, continue to reflect a narrow and historical understanding of sexual harassment centred on physical touching and “unwelcome overtures for sex” or “*quid pro quo*” sexual advances.”⁸² This finding, while not fully exhaustive or conclusive, does raise questions about whether, and to what extent, human rights tribunals may be equipped to address subtle or complex cases and, thus, the effectiveness of human rights law in currently responding to sexual harassment in its myriad forms.

Sexual Harassment Claims at the BCHRT: Relational Dynamics and the Assessment of Conduct

While the earlier section detailed the kinds of conduct that have been found to clearly fall within the parameters of sexual harassment, the cases that were dismissed for substantive reasons perhaps tell us most about how human rights tribunals understand and evaluate conduct and where the “threshold” for harassment lies.⁸³ Four of the identified cases were dismissed for substantive reasons following a full hearing, and, in all of these cases, the conduct at issue was found not to constitute sexual harassment. In each of these cases, the credibility of the complainant was called into question by the tribunal member,⁸⁴ though even accepting the facts as presented, the reasoning in the cases establishes that the conduct was understood to fall below the requisite threshold. These cases thus raise important questions about the threshold and limits of how human rights tribunals define sexually harassing conduct. These cases present two themes that appear to pose enduring problems in assessing sexual harassment complaints, related to, first, understanding relational dynamics, and, second, accounting for the broader workplace environments. This section will take up the first issue, while the following section will explore the second.

As noted earlier in this article, sexual harassment is conceptualized in a way that emphasizes a power imbalance in the employment relationship. The relational dynamics between a complainant and a harasser are an important indicator in identifying and assessing sexual harassment complaints. However, despite the importance

82. Backhouse, *supra* note 6 at 295.

83. Kang, *supra* note 34; Wideman, *supra* note 33; Sleightholm, *supra* note 36; Kuchta, *supra* note 36.

84. Issues relating to credibility are enduring obstacles for women seeking to establish a sexual harassment claim. See e.g. Gallivan, *supra* note 3 at 36–37. The issue of credibility in these cases will be more fully explored in a subsequent article.

of recognizing the role that economic and other power norms play in facilitating sexual harassment in the workplace, reliance on this criterion might inadvertently result in a narrower understanding of workplace sexual harassment, as suggested by the decision in *Kang v Hill*.

In *Kang*, the complainant, Ms. Kang, was hired as a full-time administrative assistant for Mr. Hill's company, shortly after she graduated from university.⁸⁵ Approximately one month into her employment, Hill disclosed to Kang that he had romantic feelings for her.⁸⁶ Hill also, at a later date, showed the complainant a document that listed "reasons why he loved her."⁸⁷ Drawing on what was described as a factually similar case,⁸⁸ the tribunal member concluded that the conduct in question, while it may be inappropriate, did not constitute sexual harassment because the respondent did not "proposition" Kang, there was not a significant age difference between them, there was no physical contact, Kang did not fear for her safety at any time, and the respondent did not repeat any behaviour that Kang had communicated was unwelcome.⁸⁹ These factors are a troubling representation of the boundaries of sexual harassment.

While the factors noted above by the tribunal member are certainly representative of some forms of sexually harassing conduct and its impacts, conduct that meets the threshold of sexual harassment should not be limited to these characteristics. It is concerning, for example, that conduct meeting the threshold of sexual harassment would be limited to conduct that causes the complainant to fear for her safety. Similarly, it is curious why a significant difference in age would necessarily impact the assessment of whether conduct constitutes sexual harassment, given that harassers may be both supervisors and co-workers and that power imbalances often reflect workplace hierarchy, regardless of age. Finally, the notion that there must be a "proposition" relies on historically narrow understandings of sexual harassment as sexual advances rather than the broader definition set out in *Mahmoodi* and potentially expanded upon further in *MacDonald*.

The complainant's own behaviour seemed to influence the tribunal member's reasoning in this case. For example, Hill testified that Kang asked him intimate questions, such as "how his sex life was, whether he was truly happy in his marriage, and whether he had really found the right person."⁹⁰ The tribunal member determined that, while this was not evidence of her interest in a romantic or sexual relationship, "her questions and comments led Mr. Hill to believe, correctly, that, notwithstanding

85. *Kang*, *supra* note 34 at para 8.

86. *Ibid* at para 15.

87. *Ibid* at para 26.

88. *Ibid* at para 48, citing *Courchaine v aaah . . . Balloon Delights Inc*, [1994] BCCHR No 28.

89. *Kang*, *supra* note 34 at para 49.

90. *Ibid* at paras 10, 13.

their employment relationship, she was prepared to discuss deeply personal matters with him”⁹¹—in other words, that Kang invited and encouraged the respondent to converse with her about his feelings.⁹² This impacted the tribunal member’s assessment of the power dynamics in the relationship in determining whether the conduct in question constituted harassment in this context:

I do not think that Mr. Hill’s confession was wise or even appropriate, but in the context of his workplace relationship with Ms. Kang at that time, I find that it did not, standing alone, amount to discrimination against her based on her sex. Rather than being simply an assertion of his power, it was also an acknowledgement of his weakness, which to some degree placed him under her power, rather than the other way around.⁹³

This is a particularly troubling statement because of the underlying sentiment it communicates about intimate relationships and gender roles. The idea that since Hill, her supervisor, had displayed “weakness” or vulnerability by communicating to Kang that he held romantic feelings for her, and that this gave her power in their employment relationship, seems to directly feed into problematic myths concerning women’s power of seduction and sexuality over men and the use of such myths to blame women for violence done to them.⁹⁴

While the tribunal member goes on to state that he is “not overlooking the fact that there is a necessary imbalance of power between a new, probationary employee and her boss,” he nonetheless finds that Kang wielded her own power and that the “circumstances of this case do not reveal an assertion of either form of power [sexual and economic] by Mr. Hill over Ms. Kang.”⁹⁵ This statement, coupled with the earlier findings regarding the complainant’s behaviour in encouraging intimate conversations, illustrates the continued problems in explaining and understanding the myriad strategies women may employ to deflect harassing or discriminatory behaviour or to

91. *Ibid* at para 14. The tribunal member refers back to the complainant’s behaviour in his analysis (at para 50).

92. *Ibid* at para 54.

93. *Ibid* at para 52.

94. Gallivan, *supra* note 3; Lisa S Price, *Feminist Frameworks: Building Theory on Violence against Women* (Winnipeg: Fernwood, 2005); Isabel Grant, “Intimate Partner Criminal Harassment through a Lens of Responsibilization” (2015) 52:2 Osgoode Hall Law Journal 551; Janine Benedet, “Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?” (2013) 18:2 Review of Constitutional Studies 161 [Benedet, “Marital Rape”].

95. *Kang*, *supra* note 34 at para 53. See also where the tribunal member finds that Kang left her employment not because of the workplace environment but, rather, because the respondent was reluctant to give her a substantial raise (at para 55). Earlier in the decision, evidence was admitted by the complainant that she had asked for a “settlement” (at para 38) and a raise in order to compensate her for what she described as a “compromised work environment” (at para 32).

appease the actors engaged in such conduct. In addition, this reasoning ignores the economic power that the respondent held over Kang by virtue of being her employer, despite the cursory acknowledgement given to this relationship. In addition, Kang's attempts to assert economic demands following the events in question were treated as suspicious and diminished her credibility in the eyes of the tribunal member.⁹⁶

Statements of the kind made by the tribunal member in *Kang* further deflect attention away from the alleged harasser's own conduct, which should be at the centre of the analysis, rather than the complainant's response to it. In this case, the tribunal member concluded that, while he would "hesitate to characterize Mr. Hill's behaviour towards Ms. Kang (or her response) as 'normal social interaction' . . . I do not think it crossed the line into sexual harassment."⁹⁷ This leaves open the possibility that a supervisor may engage in "inappropriate" workplace conduct without legal repercussion.

Overall, the reasoning set out in *Kang* illustrates enduring, and troubling, obstacles that complainants face in pursuing sexual harassment claims. In addition to questioning the complainant's motivations and credibility, the presence of problematic myths concerning women's sexuality and gender roles appears to have influenced at least a part of the overall analysis of the situation, reflecting the continuing impact of stereotypes and gender expectations for women who may present as less-than-ideal complainants. In addition, the narrow understanding of factors that will combine to constitute sexual harassment (such as the age disparity, need for explicit sexual propositions, and others described earlier) produces a restrictive conceptualization of workplace sexual harassment and a reductive narrative of who a legitimate complainant of sexual harassment is.

Wideman v Wiebe similarly centred on examining the particular employment relationship between the complainant and the individual respondent and the intimacy of that relationship. While the relational dynamics in *Wideman*, and the BCHRT's analysis of it, may be less troubling on the surface than in *Kang*, it does provide a point of departure for raising further questions about the complicated nature of relational dynamics and the ability of human rights tribunals to fully engage with these issues. In *Wideman*, the complainant worked for a community organization and reported directly to the organization's chair, Mr. Wiebe.⁹⁸ While there was no explicit disclosure of romantic or sexual feelings, as there was in *Kang*, the complainant testified to several incidences where she alleged that the respondent asked personal questions and made statements that could be understood as sexual and demeaning.⁹⁹ For example, the complainant testified that the respondent "told her that working with her was

96. *Ibid* at para 55.

97. *Ibid*.

98. *Wideman*, *supra* note 33.

99. *Ibid* at paras 13–23 (complainant's allegations of the conduct that she claimed constituted sexual harassment).

like taking a woman to dance and being unsure how the night will turn out.”¹⁰⁰ The complainant also alleged that the respondent made comments regarding her looks, told her that they had a “special relationship,” and disclosed that he had moved due to a prior relationship with a female co-worker,¹⁰¹ all of which could be understood to have a sexual or romantic undertone. In addition, the complainant alleged that the respondent made several demeaning comments to her, such as calling her a “single, cynical, bitter women”¹⁰² and referring to her as a “harlot.”¹⁰³ Like in *MacDonald*, these comments could be understood as derogatory comments specifically targeting the complainant’s sex.

As the tribunal member in *Wideman* described, “what Ms. Wideman alleges is an unhealthily obsessive relationship marked by a pattern of over-protectiveness, jealousy and perhaps fixation that, taken as a whole, she says amounts to sexual harassment and discrimination.”¹⁰⁴ Unlike the overtly sexualized nature of conduct in the successful cases discussed earlier in this article, this case centred on conduct that, while targeted towards Wideman as a woman, may not be as readily understood as sexualized in nature. The tribunal member seems to affirm this in noting that “[t]he conduct alleged in this complaint does not involve leering, grabbing, touching or propositioning. Further, even considered objectively, there is little in the conduct that could be considered sexual innuendo.”¹⁰⁵ This statement could indicate that the tribunal member questioned whether the conduct at issue was sexual harassment and thus points to the possibility of a narrow interpretation of sexual harassment.

The complainant’s credibility in this case was put into question by the tribunal member;¹⁰⁶ as a result, the tribunal member did not accept her testimony and found that she did not establish her claim. In reviewing the evidence offered by the complainant and other witnesses, the tribunal member found that, contrary to her assertions that Wiebe had an “obsessive” and “jealous” fixation with her, his conduct demonstrated “genuine concern” for her well-being and a more parental-like responsibility.¹⁰⁷ For example, the tribunal member stated: “I think it more likely that he [Wiebe] took his responsibility to her . . . seriously.”¹⁰⁸ The tribunal member also noted that the institutional culture of the organization “encouraged

100. *Ibid* at para 20.

101. *Ibid* at para 14. See also where the complainant alleged that the respondent called her mother to inquire if she was seeing anyone (at para 15) and where the complainant alleged that the respondent inquired about her workplace relationships (at paras 17–18).

102. *Ibid* at para 16.

103. *Ibid* at para 20.

104. *Ibid* at para 57.

105. *Ibid*.

106. *Ibid* at paras 59, 67–68, 71–73.

107. *Ibid* at paras 61–64.

108. *Ibid* at para 62.

relationships and intimacy between staff” and that “Ms. Wideman sought a family-like and intimate relationship with Mr. Wiebe and members of his immediate and extended family.”¹⁰⁹

The outcome in *Wideman* was significantly impacted by a finding of non-credibility of the complainant and, thus, of the specific allegations noted earlier. However, the case nonetheless raises questions about how human rights tribunals understand and assess relational dynamics in the workplace. This case further hints at the impact that institutional culture and workplace environments might have in the assessment of sexual harassment complaints, as the next section takes up in further detail.

Sexual Harassment Claims at the BCHRT: The Workplace Environment and Its Impact on Conduct Assessment

In addition to the problems posed in understanding relational dynamics in the workplace, the ability for human rights tribunals to fully account for workplace environments and institutional culture in their assessment of sexual harassment claims appears to present further challenges.¹¹⁰ This section describes two cases where the workplace environment impacted the overall assessment of the complaint: *Kuchta v J Lanes Enterprises* and *Sleightholm v Metrin*. In *Kuchta*, the complainant worked at a bowling alley, a small business owned by the individual respondent. While at work, Ms. Kuchta found inappropriate pictures of naked women and children on a shared workplace computer in a file folder called “Dan.”¹¹¹ The tribunal member found that the owner of the bowling alley, Mr. (Dan) Smith, downloaded the pictures.¹¹² Kuchta testified that this was not the first time she had discovered inappropriate images on the computer, and, after inaction on the part of the business owners, she resigned from her job.¹¹³ Kuchta argued that “having such pictures on a common work computer constitutes harassment,” implying that this created a sexualized work environment.¹¹⁴

The tribunal member found that the conduct in question did not constitute sexual harassment, noting that “[t]he circumstances of this case do not reveal an assertion of either form of power [economic or sexual] by Mr. Smith over Ms. Kuchta.”¹¹⁵ In

109. *Ibid* at para 61.

110. Gallivan, *supra* note 3 at 38–39; Faraday, *supra* note 3 at 53–54. Similarities concerning the limitations of understanding sexual harassment and hostile work environments have been raised in the United States. Schultz, *supra* note 22.

111. *Kuchta*, *supra* note 36 at para 6.

112. *Ibid* at para 8.

113. *Ibid* at paras 9–11 (complainant testified that she had asked Ms. Smith, the owner’s wife, to remove the pictures from the computer and that this was not done immediately).

114. *Ibid* at paras 9, 14.

115. *Ibid* at para 16, citing *Kang*, *supra* note 34, in relation to this statement.

other words, emphasis was placed, in part, on the lack of active conduct directed at the complainant by the individual respondent. However, this ignores the fact that a sexual harassment claim can be based on a “poisoned work environment.” A “poisoned work environment” may reflect the existence of a broad-based workplace culture that sexualizes, demeans, or otherwise discriminates against women.¹¹⁶ While the tribunal member’s reasoning acknowledged broader environmental concerns, she also found that the fact that the images were not immediately deleted did not result in a “worsening of the workplace environment.”¹¹⁷

This case reveals potential limitations in understanding sexual harassment as a human rights violation, especially for claims that rely on a generally sexualized or poisoned work environment rather than on particular conduct engaged in by an individual actor. For example, while few legal cases have considered pornography in the workplace as forming the basis of sexual harassment claims, it is clearly identified as such in principle.¹¹⁸ This is because the “presence of pornography in the workplace creates an unequal working environment for women,”¹¹⁹ though cases where this has formed the successful basis of a human rights complaint have also involved verbal comments made by individuals.¹²⁰ The presence of pornography alone may be insufficient to create a “sexually harassing work environment” under human rights law, despite the fact that its presence creates a sexualized working environment.¹²¹ This limitation is due to the fact that the legal principles governing discrimination claims have been largely developed and interpreted in a way that relies on individual actors responsible for actively engaging in prohibited conduct. In many jurisdictions, this limitation may be mitigated by the public education work of a human rights commission, which, for example, could set out guidelines prohibiting pornography in the workplace,¹²² thus engaging in preventive activities that work to shift institutional norms and expectations, filling the gap of the individual complaints-based process of the tribunal.

In *Sleightholm*, the complainant worked as a communications coordinator for Metrin, a company that manufactures and sells skin care products. Ms. Sleightholm brought a human rights complaint against Metrin and its owner, Mr. Fukuhara, related to incidences involving intimate conversations,¹²³ the sharing and discussion of sexually provocative materials,¹²⁴ and one instance where the complainant alleged

116. Backhouse, *supra* note 6 at 295.

117. *Kuchta*, *supra* note 36 at para 17.

118. Benedet, “Pornography”, *supra* note 16 at 417–24. Benedet also notes that the Canadian Human Rights Commission explicitly includes pornography as a type of sexual harassment in its guidelines (at 421).

119. *Ibid* at 417.

120. *Ibid* at 421–24, discussing *Pond v Canada Post Corp*, [1994] CHR D No 9.

121. *Ibid* at 432.

122. *Ibid* at 421 (Canadian Human Rights Commission).

123. *Sleightholm*, *supra* note 36 at paras 21–22, 33.

124. *Ibid* at paras 16, 23–26.

that the respondent tried to kiss her.¹²⁵ In her analysis, the tribunal member questioned the credibility of the complainant, and this affected her findings of fact and application of the legal principles.¹²⁶ However, aside from this, she also found that, given the particular workplace environment at Metrin,¹²⁷ certain incidences, while they might otherwise have amounted to sexual harassment, did not. For example, the complainant pointed to conduct such as hugging and blowing kisses. The tribunal member found, however, that this behaviour was “normal for the office they were in and was not protested by her or any other employee.”¹²⁸ In addition, one incident involved Fukuhara sharing a dream he had of Sleightholm in a bath.¹²⁹ The tribunal member noted that sharing this dream “might easily be construed as amounting to sexual harassment” in another context, but the sharing and interpretation of dreams was a frequent “subject of conversation” at Metrin.¹³⁰ This fact, coupled with the complainant’s own regular participation in such activities, affected the characterization of the conduct in question.¹³¹

The analysis and outcome in *Sleightholm* was heavily influenced by the negative credibility assessment of the complainant. However, this case also illustrates the complexity and difficulty of accounting for workplace culture in assessing sexual harassment complaints. The “bath dream” exemplifies this problem. While it may have been normal in that workplace to discuss and interpret dreams, this should not equate to finding that any and all subject matter of dreams are appropriate for discussion. More broadly, while context is important to evaluating conduct, this case illustrates the problems that can arise when a workplace environment is taken as a neutral background for assessing sexual harassment¹³² rather than critically evaluating that environment itself or identifying and articulating boundaries on workplace environments or culture when it crosses the threshold of appropriate conduct. This reflects a much wider problem of normalized sexual harassment against women and the inadequacy of legal tools to address this issue.¹³³

125. *Ibid* at para 34.

126. *Ibid* at paras 53–54.

127. Which is described as “open”, “close and candid”, and “more like a family than an office” (*ibid* at para 8).

128. *Ibid* at para 73.

129. *Ibid* at para 20.

130. *Ibid* at paras 55–58.

131. *Ibid* (noting that the complainant often instigated conversations about her own dreams at the office (at para 56) and noting that the complainant sent the respondent sexually provocative videos (at para 67)).

132. Gallivan, *supra* note 3 at 38–39.

133. Grant, *supra* note 94; Benedet, “Marital Rape”, *supra* note 94; Janine Benedet & Isabel Grant, “Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities” (2014) 22:2 *Feminist Legal Studies* 131; Catharine A MacKinnon, “A Sex Equality Approach to Sexual Assault” (2003) 989:1 *Annals of the New York Academy of Sciences* 265.

Overall, despite broad recognition of the ways in which a workplace environment or institutional culture can foster a generalized sexually discriminatory and harassing environment, the ability of human rights tribunals to fully account for this context appears constrained. This appears connected, in part, to a continued focus on individual bad actors engaged in active conduct, which is a critique of sexual harassment law noted in the first section. However, accounting for the ways in which a broader workplace environment can impact on, and colour, the conduct of individual actors appears to be a necessary factor for tribunals to consider in assessing sexual harassment claims. As such, this may present an area for further research and/or work by human rights commissions.

Conclusion

This article has described and assessed substantive decisions on the merits of workplace sexual harassment claims at the BCHRT from 2010 to 2016, focusing on an analysis of what conduct constitutes sexually harassing behaviour. While the issue of workplace sexual harassment is an ongoing concern, limited research has documented its substantive treatment in law in contemporary contexts.¹³⁴ As workplace sexual harassment has largely become the purview of anti-discrimination law, within the domain of human rights tribunals, gathering information on the characteristics and analysis of such complaints provides firm grounding for further work on this issue.

Overall, the identified cases discussed in this article establish that the broad definition of sexually harassing conduct set out in *Janzen* and *Mahmoodi* has brought positive developments to assessing workplace sexual harassment under human rights law. For complaints that more easily fit within historical understandings of sexual harassment—conduct that is sexualized in nature, that involves physical touching or sexual propositions, and is perpetrated by an individual actor—human rights tribunals appear well equipped to assess such claims. However, the identified cases have also highlighted enduring issues attending the legal assessment of sexual harassment. Accounting for institutionalized dimensions of sexual harassment in the workplace, beyond specific instances of harassment by an individual bad actor, appears to present an ongoing challenge for tribunals. In addition, because the body of identified cases most often centres on blatant forms of sexual harassment, it is unclear how well equipped tribunals may be to account for, and remedy, covert and subtle forms of sexual harassment in the workplace. The cases examined in this article raise concerns about the ability of tribunals to understand and properly account for nuanced and complicated relational dynamics in assessing subtle, covert, or other conduct

134. Sheppard, “Systemic Inequality”, *supra* note 3; Aggarwal & Gupta, *supra* note 3; Faraday, *supra* note 3; Gallivan, *supra* note 3; Welsh, Dawson & Griffiths, *supra* note 3; Hart, *supra* note 3; Johnson, *supra* note 3.

not overtly sexual in nature. Finally, as documented in *Kang*, and to a lesser degree in *Wideman*, problematic myths concerning complainant behaviour may continue to influence the assessment of sexual harassment claims.

As noted at several points throughout this article, issues related to credibility, character, and consent intersect in significant ways with the assessment of conduct and the outcome of cases in the identified set. Forthcoming research on these issues will add greater depth to understanding the problematic trends in adjudication highlighted throughout these cases and will shed additional light on the work to be done to ensure that human rights tribunals are an effective legal vehicle through which to respond to sexual harassment claims, not only for procedural reasons but also, significantly, for their substantive understanding and application of sexual harassment law.

About the Contributor / Quelques mots sur notre collaboratrice

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