



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Caesar Lewis

Applicant

-and-

Sugar Daddys Nightclub

Respondent

DECISION

Adjudicator: Alison Renton
Date: March 17, 2016
File Number: 2014-19766-I
Citation: 2016 HRTO 347
Indexed as: **Lewis v. Sugar Daddys Nightclub**

APPEARANCES

Caesar Lewis, Applicant)	Sydney Osmar, Student-at-Law,
)	and Cornelia Mazgarean, Counsel
)	
)	
Sugar Daddys Nightclub, Respondent)	No one appearing
)	
)	

[1] This Application, which was filed January 2, 2015, alleges discrimination with respect to gender identity, gender expression and sexual orientation because of goods, services and facilities contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”). The applicant identifies as a transgender neutral questioning transgender male. His Application is about what occurred when he and some of his friends attended the respondent, a nightclub, during the late hours of January 4, 2014 and early hours of January 5, 2014.

[2] A hearing was scheduled for February 12, 2016. The applicant and his representatives attended the hearing but the respondent did not. The Tribunal held down the start of the hearing until 11:00 a.m., and with the respondent still not in attendance, the hearing commenced. The respondent did not attend the hearing or otherwise communicate with the Tribunal.

THE RESPONDENT’S FAILURE TO PARTICIPATE IN THE TRIBUNAL’S PROCESS

[3] The respondent filed a Response in February 2015 denying the allegations. However, since filing the Response, the respondent has not participated in the Tribunal’s process, complied with its directions, or otherwise communicated with the Tribunal. This includes failing to attend the mediation scheduled for June 17, 2015 and the hearing scheduled for February 12, 2016.

[4] The Tribunal’s correspondence to the respondent has been sent to the address identified on the Response. It is the same address as the applicant identified on his Application. The Tribunal has sent to that address the following: a Notice of Mediation dated March 26, 2015; Registrar’s letter dated June 18, 2015; Case Assessment Direction dated June 23, 2015 (the “June CAD”); Notice of Hearing dated August 26, 2015; and Case Assessment Direction dated January 26, 2016 (“the January CAD”). Each of these was sent by regular mail and none was returned as being undeliverable. The June CAD was also sent by email. It was not returned as being undeliverable.

[5] The January CAD, which set out the date, time, and location of the hearing, was sent by regular mail, email to two different email addresses provided by the respondent, registered mail and courier. The couriered material was returned by Purolator indicating that the respondent failed to pick up the couriered package. The January CAD was not returned by any of the other methods of delivery. An individual “K. Kiera” signed for the registered letter according to Canada Post’s tracking information.

[6] In these circumstances I am satisfied that the respondent had notice of the hearing and chose not to attend it.

THE IDENTITIES OF THE SECURITY GUARDS

[7] After the Response was filed, the applicant filed a Request for Order During Proceedings (“RFOP”) seeking the names of the three security officers, whom he identified by physical descriptions, and stating his intention to add them as personal respondents.

[8] The respondent failed to file a Response to the RFOP, such that the RFOP remained outstanding at the hearing. The identity of the security officers was not known to the applicant.

THE EVIDENCE

[9] As the respondent did not participate in the hearing, the evidence of the applicant was not contested. The applicant adopted the allegations in the Application as his evidence, and testified to supplementary questions asked by his representative and some questions posed by the Tribunal. Accordingly, I accept the applicant’s evidence and do not place any reliance upon the Response that the respondent had filed.

[10] The applicant, who is in his 20’s, attended the respondent nightclub late on January 4, 2014, along with three friends. The applicant self-identifies as transgender neutral questioning transgender male. He explained to me during the hearing that he identified on January 4, 2014, and all days, as male. Two of his friends were female and

another identifies as a transgendered male. After a period of time, each needed to use the washroom. The applicant's female friends entered the women's washroom and the applicant and his male friend entered the men's washroom.

[11] Previously, the applicant has used the men's washroom in other locations. He testified that he feels safer using the men's washroom to the women's washroom, and prefers to use the men's washroom because he identifies as male. Further, he has had some negative experiences using women's washrooms, including stares and negative comments.

[12] As they were not able to use the urinals, the applicant and his male friend entered the washroom cubicles. While in the cubicle, the applicant was interrupted by aggressive banging on the door. A voice yelled, "Hey you need to get out of the male washroom". The applicant did not respond. The banging continued, with the person saying, "Either you get out or I get you out". The applicant responded by saying, "Okay, I'm almost finished, I'm coming out".

[13] However, seconds later the cubicle door was forced open by a security guard who dragged the applicant out of the cubicle while he was still urinating. Outside the cubicle, the applicant struggled to pull up and fasten his light coloured jeans. He was extremely embarrassed when he notice wet urine spots on his jeans. The incident was witnessed by the washroom attendant, other individuals using the washroom and the applicant's male friend.

[14] The applicant's male friend told the security guard that using the men's washroom was their preference and their right to use it. The applicant asked the security guard to let him go, but the security guard held tightly onto him.

[15] The applicant's male friend showed the security guard his passport, which identified his legal name before he transitioned. The security guard became completely outraged. He yelled, "You freaks need to get your fucking faggot asses out of this club. At first I was gonna just take you out of the washroom but y'all hermaphrodites need to

get your disgusting asses out of this club”. He then grabbed the applicant by the hair and shirt and proceeded to drag him out of the washroom, through the entire club, and out the front door. The applicant was tossed out of the nightclub and felt like “yesterday’s trash”. The applicant’s male friend followed out the applicant, but he was not dragged out.

[16] The incident attracted the attention of numerous people in the nightclub. The applicant felt humiliated also by the security guard’s excessive force and inappropriate language.

[17] As the applicant and his friend stood outside, they watched the security officer speak to two other security officers. All three of the officers began to laugh and point in the direction of the applicant and his friend.

[18] One of the other security officers approached the applicant and his male friend and demanded to see the friend’s passport. The friend showed the passport and this security officer said, “Look at this faggot shit”, and showed the other officers the passport. The applicant and his male friend attempted to reiterate that it was their right and preference to use the men’s washroom.

[19] The security officer whipped the passport at the applicant’s male friend. He got very close to the applicant’s friend’s face and said, “If you come here and use the male washroom again little girl, you and your friend will be dragged out and we’ll bring you behind the building this time”. He slammed his fist against a window behind the applicant’s friend, and the loud bang frightened the applicant, his friend and some other bystanders.

[20] Given that it was early January and the temperature was cold, at this point, the applicant requested the return of his jacket from the coat check. One of the security officers said, “Oh you want your jacket, okay no problem”, however, they stood laughing and ignored the applicant’s request.

[21] The third security guard requested the coat check tickets. The applicant handed him his ticket and the guard asked the size of the applicant's coat. The applicant answered 2XL. The third security guard then stated "Anyone fit into a 2XL jacket anyone, anyone, highest bidder?"

[22] The applicant and his male friend wanted to go home as it was freezing cold and wet. They texted their female friends, who retrieved their own coats and came outside to meet the applicant and his male friend. The applicant's female friends could not get the applicant's coat and the security officers denied having the applicant's coat check ticket, claiming that they returned it already to the applicant.

[23] When the applicant's male friend demanded the return of the applicant's coat check ticket, the second security guard grabbed the applicant's friend by his face, pushed him against the wall and said, "Didn't I tell you faggot dykes to leave". He held the applicant's friend's face for 30 to 60 seconds, squeezing aggressively.

[24] The applicant stepped in and tried to remove the guard's hand from his friend's face, and demanded that he let go. The second security guard backhanded the applicant in his face. Then all three security guards started to physically assault the applicant by pushing him to the ground, kicked him approximately 10 times in the back and head, and punched him approximately 10 times.

[25] The applicant's female friends were screaming at the security officers to stop, but they did not. The applicant was going in and out of consciousness.

[26] When the security officers stopped, the applicant's friend helped him up. The applicant felt like he had been hit by a car, he was embarrassed as he could hear some bystanders cheering and encouraging the security guards, and others yelling for them to stop. He had bleeding around his ear piercings because his earrings were yanked out during the assault and he was missing his jewelry.

[27] The next day, the applicant was still not feeling well and attended the hospital. A copy of the hospital report, noting some physical injuries, was entered as an exhibit.

[28] The applicant also attended a police station in Toronto, where the applicant was then living, where he was advised to report the assault to the Peel police, given the location of the respondent. The applicant got a drive to a Peel police station a couple of days later where he met with an officer. A copy of the police occurrence report was entered as an exhibit. The applicant did not testify about what, if anything, happened as a result of reporting this incident to the police.

[29] The applicant testified about the impact that the incident with the respondent had on him. He stated that he grew up with a supportive family who let him express himself freely. His male friend had started transitioning, but the applicant had not yet started. After the incident at the nightclub, he felt very discouraged about who he was, who he was transitioning to be, and he did not feel good about himself. He was questioning and is afraid to transition because of what happened.

[30] The applicant said that he did not feel that he had been treated fairly or like a human being by the respondent. Things could have been dealt with or handled differently, he stated. Now when he is out, he tries not to use the washroom, or he uses public washrooms that are single use such as those found at coffee places or gas stations.

[31] After this incident, he tried to attend some counselling, but did not feel it was a good fit as it was about lesbians, and he is not a lesbian. He continues to be on a waiting list for trans counselling and that list is very long. He and his male friend who also attended the respondent used to speak to youth at transitional classes, but he has stopped attending those. He does not go out as he did previously, and friends and family say that he is now more introverted. He thinks that he may be depressed, but has not been diagnosed with depression.

[32] The applicant seeks \$15,000 as monetary compensation for injury to dignity,

feelings and self-respect. He also seeks \$840 for his winter jacket that was not returned to him, \$650 for the loss of jewellery, and training for the respondent specific to gender expression and diversity as the respondent is still operating. The applicant noted that the respondent has not taken his issues seriously, as evidenced by its lack of participation in the process.

THE LAW AND ANALYSIS

[33] As I have determined that the respondent has chosen not to participate in the hearing, I have placed no reliance upon the Response. Despite this, the applicant still has the burden of proving on a balance of probabilities that a violation of the *Code* has occurred. A balance of probabilities means that it is more likely than not that a violation has occurred. Clear, convincing and cogent evidence is required in order to satisfy the balance of probabilities test. See *F.H. v. McDougall*, 2008 SCC 53 at para. 46.

[34] In order to establish a case of discrimination, an applicant must prove that: (1) he was a member of a group protected by the *Code*; (2) that he was subjected to adverse treatment; and (3) that his gender identity, gender expression, or sexual orientation were factors in the adverse treatment. See *Shaw v. Phipps*, 2010 ONSC 3884 at para. 47, upheld 2012 ONCA 155, and *Peel Law Association v. Pieters*, 2013 ONCA 396 at para. 56.

[35] Section 1 of the *Code* states:

Every person has the right to equal treatment with respect to services, good and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

[36] “Gender identity” and “gender expression” were added to the *Code* in 2012 pursuant to *Toby’s Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression)*, 2012, which received Royal Assent on June 19, 2012. The purpose in adding these grounds to the *Code* was to address a perceived

gap in the protection afforded to transgendered or other gender non-conforming persons. The Tribunal explained it in *Browne v. Sudbury Integrated Nickel Operations*, 2016 HRTO 62 at paras. 34 to 35 as:

I say that this was a “perceived” gap in the *Code* on the basis that the Commission in 2000 had taken the position that gender identity was already covered under the protected ground of sex, and the case law of this and other human rights tribunals already had recognized that discrimination against a person because they are transgendered or gender non-conforming was prohibited by the *Code*: see *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 and the cases cited at para. 88. However, there was some uncertainty as to the appropriate protected ground to rely upon and there was not yet clear judicial consideration of this issue. As a result, *Toby’s Law* received the support of all parties in the Legislature to ensure beyond any doubt that the rights of transgendered and other gender non-conforming persons were protected under the *Code*.

That it was the Legislature’s intention to ensure the protection of the rights of transgendered and gender non-conforming persons by enacting *Toby’s Law* is abundantly clear from a review of Hansard and the legislative debates on this Act. In particular, repeated emphasis was placed on the severe social, economic and historical disadvantage experienced by this community. This severe disadvantage is reflected in the Commission’s Policy, which also states: “The grounds [of gender identity and gender expression added as a result of *Toby’s Act*] make it clear that trans people and other gender non-conforming individuals are entitled to legal protections in the same way that people are protected from discrimination and harassment based on race, age, disability and all other prohibited grounds.”

[37] The Ontario Human Rights Commission (“the Commission”) issued a policy in 2014, after the incidents that gave rise to this Application, entitled “Policy on preventing discrimination because of gender identity and gender expression”. In it, the Commission provides explanations about what “gender identity”, “gender expression” and “trans” or “transgender” mean. For “trans” or “transgender”, this can include, but is not limited to, transgender, trans woman (male-to-female), trans man (female-to-male), transsexual, cross-dresser, gender non-conforming, gender variant, or gender queer.

[38] While “gender identity” and “gender expression” may have been covered under the protected ground of “sex”, for many people, these *Code* grounds introduce new

concepts. Some refuse to accept the concepts, and actively oppose the inclusion of individuals who fall within these *Code* protections into society. The Tribunal has recognized that transgendered persons have historically been a disadvantaged group who face extreme social stigma and prejudice in our society. See, for example, *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 at para. 165. Many do accept trans people and other gender non-confirming individuals, but find the concepts new, confusing, and difficult to integrate into traditional society, such as washrooms, locker rooms, change rooms and other gender-specific services and facilities.

[39] The law on these *Code* grounds is constantly developing, in all social areas, as new issues are raised and considered.

[40] In *Vanderputten v. Seydaco Packaging Corp.*, 2012 HRTO 1977, an application which was filed before “gender identity” and “gender expression” were introduced into the *Code*, the Tribunal found that the applicant was discriminated against on the basis of sex in employment when she transitioned from male to female. The applicant was subjected to a poisoned work environment, through harassing comments about her gender identity and being required to use the men’s change room, and was ultimately dismissed because of her sex. Amongst other remedies, the Tribunal ordered the respondents to pay \$22,000, which was a lower amount than what would have been ordered because of the applicant’s sometimes aggressive, inappropriate and insubordinate behaviour in the workplace.

[41] In *XY*, above, the Tribunal found that the government’s requirement that an applicant obtain “transsexual surgery” in order to obtain a change of sex designation on a birth certificate was discriminatory. Notwithstanding this finding, the Tribunal declined to award a monetary remedy to the applicant because different considerations arise when the violation is infringed by the government pursuant to legislative provision. It did order various non-monetary remedies.

[42] In *McMahon v. Wilkinson*, 2015 HRTO 1019, two applicants filed applications alleging discrimination in housing. The applicants were a same-sex couple, and

married. One of the applicants was a trans woman. The Tribunal found that the landlord refused to rent to them upon learning that one was transgendered because he felt that other tenants would feel uncomfortable, which amounted to discrimination because of gender identity for one applicant and association with another for the other applicant. The Tribunal ordered \$5,000, divided between the applicants, the amount that they requested.

[43] In a recently issued Interim Decision, *T.A. v. Ontario (Transportation)*, 2016 HRTO 17, the applicant alleges that the use of binary gender designation on driver's licenses and health cards is discriminatory because of gender identity and gender expression with respect to goods and services. While the Interim Decision addresses the production of documentation, the Tribunal's Associate Chair, at para. 2 stated:

The applicant identifies as pan-gendered and prefers the use of gender-neutral pronouns "they", "them" and "theirs". The applicant's use of plural pronouns was replicated throughout the submissions made by applicant's counsel. The scheme developed to date by the respondent to designate gender on identification documents is binary only: male or female. This is a novel Application that seeks to establish a more fluid or non-specified gender (referred to as "pan-gender") on government-issued identity documents.

[44] The Tribunal has recognized that there will be circumstances in which a transgendered person may not be treated in the same manner as others with their lived gender. In *Vanderputten*, above, the Tribunal's former Associate Chair observed:

This is not meant to suggest that in any circumstance and upon request, a transgendered person must necessarily be treated in exactly the same manner as others with their lived gender. The issues involved in addressing transitions in the workplace may be complex, in particular regarding the use of washrooms or locker rooms. Society typically divides facilities based on sex, and separate use of such facilities is linked with notions of privacy, identity, public decency and sexuality. Issues about what human rights legislation requires in terms of treatment of transgendered, intersex, transsexual and other gender identities in areas that have been divided by sex have been, and doubtless will continue to be, the subject of litigation and analysis under human rights legislation: see, for example, *Forrester [v. Peel Regional Police Services Board]*, 2006 HRTO 13]; *Mamela v. Vancouver Lesbian Connection* (1999), 36 C.H.R.R.

D/318 (B.C.H.R.T.); *Sheridan v. Sanctuary Investments Ltd (No. 3)* (1999), 33 C.H.R.R. D/467 (B.C.H.R.T.); *Nixon v. Rape Relief Society*, 2002 BCHRT 1; 2005 BCCA 601. Such issues may require a balancing and reconciling of various rights and interests. Issues of balancing need not be analysed in this case. The applicant does not make a claim based on the use of washroom facilities. ...

[45] The *Code* itself contains section 20(1), which states:

The right under section 1 to equal treatment with respect to services and facilities without discrimination because of sex is not infringed where the use of the services or facilities is restricted to persons of the same sex on the ground of public decency.

[46] However, as the respondent did not participate, section 20(1) of the *Code* need not be considered in the facts of this case.

[47] The applicant self-identifies as a transgender neutral questioning transgender male. This brings him under “gender identity” or “gender expression”, and thus under a *Code*-protected ground.

[48] There is no doubt that the applicant was subjected to adverse treatment. The first security officer barged into the washroom cubicle that the applicant was using, where there is a high expectation of privacy, and physically removed the applicant from the washroom. This same security officer physically removed the applicant from the nightclub itself. Then the applicant was subjected to physical assault by the three security officers and threatened with further, and potentially worse, violence if he and his male friend attended the nightclub again.

[49] I find that the respondent’s conduct, demonstrated through the actions of its three security officers, particularly the first one, was because of the applicant’s gender identity and gender expression. To me, this is obvious from the statements made by the first security officer towards the applicant, the applicant’s male friend, and then towards both of them, including “you freaks”, “...you fucking faggot asses”, “...y’all hermaphrodites need to get your disgusting asses out of this club”, “faggot shit”, and “Didn’t I tell you

fucking dykes to leave?” combined with the physical actions of removing the applicant from the washroom cubicle and then the nightclub itself.

[50] There is no evidence of whether the security guards were employees of the respondent, or agents acting for the respondent. In either situation, pursuant to section 46.3(1) of the *Code*, the respondent is responsible for the conduct of its officers, officials, employees and agents. See *Manu v. Centum Fundamental Financial Inc.*, 2015 HRTO 725 at para. 55 and *Srouji v. Direct IME*, 2012 HRTO 449 at para. 13.

REMEDIES

[51] The Tribunal’s remedial jurisdiction is set out in sections 45.2(1) and (2) of the *Code*. These provide that the Tribunal has the power to order monetary compensation for injury to dignity, feelings and self-respect; to order restitution; and to direct any party to do anything that promotes compliance with the *Code*.

[52] It is well-established that the purpose of the *Code* is remedial, not punitive. See, for example, *Ontario Human Rights Commission v. Farris*, 2012 ONSC 3876 at para. 36. The purpose of ordering that monetary compensation be paid to an applicant is an attempt to restore the applicant to the position he or she would have been in had the discrimination not occurred. An award of monetary compensation seeks to compensate the victim of discrimination and not punish the perpetrator. Intention to discriminate is not required. See *Ontario (Human Rights Commission) v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.) at para. 18.

[53] There is no evidence in this case with respect to the financial means of the respondent; whether it is a small business or otherwise. However, in assessing quantum, the Tribunal is mindful of not setting the amount too low so as to avoid trivializing the social importance of the *Code* by effectively creating a “licence fee” to discriminate. See *Sanford v. Koop*, 2005 HRTO 53 at para. 34, and *Ferreira v. KMS Van Lines Inc.*, 2013 HRTO 182 at para. 102.

[54] In the oft-cited *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, the Tribunal

explained that there are several key factors that it considers in ordering remedies, specifically the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination.

[55] Objectively, the respondent's conduct is egregious. Its security officers not just removed the applicant from a washroom cubicle, while he was using it and where there is a high expectation in a cubicle of privacy, but physically removed him from the nightclub and then physically assaulted him such that he suffered physical injuries for which he sought medical treatment. The medical documentation filed as an exhibit noted a number of physical injuries and diagnosed the applicant as having a concussion, for which he was prescribed medication. The treatment at the nightclub was witnessed by other patrons, including those in the washroom, and outside the club.

[56] Furthermore, during his interactions with the applicant, the first security officer made a number of offensive, derogatory, hateful comments to and about the applicant and his male friend.

[57] Subjectively, the incidents at the nightclub greatly impacted the applicant. He was embarrassed and humiliated by the security guard's (and guards') conduct towards him, which was done in front of others, some of whom were encouraging the officers. He was forcibly removed from the washroom with urine stains on his pants and then pulled by the hair and clothing while being physically removed out of the nightclub.

[58] The applicant became worried, after the incident with the respondent, about using the washroom facilities in other locations in fear that something similar would happen. Most importantly, he has become fearful to continue with his transitioning and questions who he really is.

[59] There was no basis to question the credibility or reliability of the applicant's evidence. Given what had happened to him, along with the fact that the respondent was not present, the applicant's evidence was, if anything, very understated. He was deliberate in his observations, thoughtful in his commentary, and even stated that there

were different ways the respondent could have addressed the issue of him using the men's washroom with him if it felt there was a problem.

[60] While I may have awarded more given the circumstances of this case, the applicant has asked for \$15,000 as monetary compensation for injury to dignity, feelings and self-respect. Considering the objective and subjective factors set out above, I find no basis to award less than the \$15,000 requested, and I order accordingly.

[61] I also find it appropriate to order that the respondent provide, within six months of this Decision, human rights training to its employees, management, and staff, including security guards, officers or bouncers, specifically on the issues of gender expression, gender identity and sexual orientation. The respondent is directed to provide confirmation of such training to the applicant's legal representatives.

ORDER

[62] Accordingly, the Tribunal orders the following:

1. Within 30 days of the date of this Decision, the respondent shall pay to XXXXX [redacted from original] (otherwise known as Caesar Lewis) the amount of \$15,000.00 as monetary compensation for injury to dignity, feelings and self-respect;
2. Post-judgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, shall be paid if the amount in para. 1 is not paid within 30 days from the date of this Decision; and,
3. Within six months from the date of this Decision, the respondent shall provide human rights training to all staff, including its security guards, on the issues of gender identity, gender expression and sexual orientation and to confirm such training to the applicant's legal representatives.

Dated at Toronto, this 17th day of March, 2016.

"Signed by"

Alison Renton
Vice-chair