

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

BERNARD PETER YOUNG

Grievor

and

**TREASURY BOARD
(Indian and Northern Affairs Canada)**

Employer

Before: Joseph W. Potter, Deputy Chairperson

For the Grievor: Kenneth B. Young, Counsel

For the Employer: Robert B. Lindey, Counsel, and Cynthia C. Myslicki, Counsel

Heard at Winnipeg, Manitoba,
June 15 to 17, 1999.

DECISION

Mr. Bernard Young, who is employed by Indian and Northern Affairs Canada (INAC) at the PM-4 level, has grieved a 10-day suspension issued on November 28, 1996. The disciplinary letter (Exhibit E-5) states, in part:

Disciplinary Letter - Suspension without Pay

This letter is written as a follow-up to the allegations of complaints of sexual harassment against you which were alleged to have occurred at the Funding Services workshop in Gimli, Manitoba on September 17 and 18, 1996. An investigation was undertaken and the report that resulted has been provided to you.

As a result of this investigation, I have accepted the findings of this report and am satisfied that you have engaged in inappropriate behaviour for which disciplinary action is warranted. The behaviour demonstrated by you is in violation of the departmental Harassment Prevention Policy and is clearly unacceptable.

In view of the forgoing, you are suspended from duty without pay for ten days effective Monday, December 2, 1996 to Friday, December 13, 1996, inclusive. During this period of suspension you are not to enter departmental premises nor have any contact with departmental employees unless you are specifically authorized by Arun Dighe, Director, Funding Services.

...

The employer's counsel requested that the written decision not refer to the complainants by name, and counsel for the grievor did not object. Consequently, I will simply refer to the two complainants as witness #1 or witness #2, as the case may be.

The employer's counsel filed ten exhibits and presented four witnesses in chief, and a further two in rebuttal (one of whom the parties agreed as to what she would say if she testified).

The grievor's counsel filed one exhibit and presented four witnesses in support of the grievor's case.

I granted the employer's request for the exclusion of witnesses.

Evidence

Ms. Brenda Kustra, the Regional Director of the Manitoba region of INAC, testified that in 1996 she had overall responsibility for some 200 full-time employees in the region. Included in this was a section titled the Funding Services Directorate where some 45 to 50 employees worked and negotiated with various First Nations on a variety of issues. Included in this Directorate were Funding Services Officers (FSO), where the grievor and witness #1 and witness #2 were employed.

On September 17 and 18, 1996, the Funding Services Directorate conducted an out-of-town workshop in Gimli, Manitoba, the objective of which was a team building exercise. Ironically enough, it was at the workshop where the alleged sexual harassment took place.

First Incident

Witness #1 testified that she began her employment with INAC about one and one-half years prior to the workshop being held, and had occasional contact with the grievor, during working hours only, with no negative encounters prior to the incident in question.

Witness #1 stated she left the regional office by bus, to go to the workshop with most of her fellow employees, on the morning of September 17. Following the arrival and check-in of the attendees, the workshop began about 10:00 a.m. and lasted until 4:30 p.m. or so on the first day. After 4:30 p.m., people went in different directions as nothing specific was planned for them. The witness and four or five of her colleagues had dinner together in the hotel. A hospitality room had been arranged and witness #1 went there between 8:00 and 9:00 p.m. From there, witness #1 went to a local bar with her colleagues where she remained for a couple of hours. Up to that point in the evening, she testified she had consumed two glasses of wine with her meal and two scotches at the bar.

The witness left the bar and proceeded to the beach nearby, as a group of fellow employees had said they would continue to socialize and have a sing-a-long. The witness observed some 10 to 12 people sitting in a circle on the beach singing and chatting. She left briefly, then returned between 11:30 p.m. and midnight and chatted

with some follow employees, including witness #2. Witness #1 then sat down beside the grievor, as it was the only spot open in the circle. She was also trying to avoid any contact with a manager (not the grievor) who had been making unwanted advances towards her that evening. The witness testified she was only there for about one minute when Mr. Young put his right arm around her shoulders and his hand landed on her breast and, she testified, "there was a squeeze". She yelled and jumped up and looked at him. She testified he was in a stupor and he appeared very drunk at the time.

Witness #1 testified she immediately left the beach and went back to her hotel. While waiting at the elevator, she saw another colleague, Mr. Roy Jangula, and asked him to take her out of the hotel. They proceeded to walk along the beach.

Mr. Jangula was also an FSO attending the workshop. He was socializing with his colleagues after the workshop ended on September 17, and at about 12:30 a.m., he was in the lobby of the hotel when he saw witness #1 by the elevator. She appeared distraught and asked Mr. Jangula to get her out of the hotel. He took her arm and they walked for about one hour. Witness #1 explained that she was being harassed by a manager, but she did not mention, at that time, that Mr. Young had grabbed her breast. She then told Mr. Jangula she did not want to talk about it anymore. They returned to the hotel and witness #1 went to her room. Mr. Jangula testified that on the following day, when back in the office after the workshop ended, witness #1 spoke to him about Mr. Young grabbing her breast. He testified she told him she felt filthy and violated by this action and wanted to cut off her breast.

Second Incident

Witness #2 joined INAC on January 16, 1995, also as an FSO. She too attended the workshop on September 17 and 18, 1996. She knew Mr. Young from work, although she did not work directly with him. She testified he was a quiet individual who did his work and always had a joke to tell. Prior to the workshop, she had had no problems with Mr. Young.

Witness #2 stated that after the workshop ended on the first day, she went for dinner, then to the hospitality room, and eventually arrived at the beach around midnight on September 17. Up to that point in time, witness #2 testified she had

consumed four drinks. At the beach, she sat beside Mr. Young and said hello to him. He put his arm around her and pulled her towards him and kissed her on her right cheek. She said no to him and left. She testified he had a glazed look about him and she walked away. She walked back to the hotel where she met a colleague, Mr. Fontaine, and he asked if she would assist him in cleaning up the hospitality room. Mr. Fontaine's testimony supported this. She obliged, then went to her room. When she got there, her roommate and another individual were talking so she left and walked back to the beach. When she approached the group, she saw Mr. Young walking away; she went over to the group but did not sit down. As she turned towards the group, Mr. Young came up to her from her left side and kissed her again on the left cheek. Witness #2 said she walked away and said she was leaving.

She testified two colleagues, Stella Pruse and Earl Fontaine, both asked her to take Mr. Young with her back to the hotel but she said no. Ms. Pruse and Mr. Fontaine testified they did not make this request of witness #2.

In any event, witness #2 was proceeding back to the hotel and she testified she was upset. Mr. Young was also going back to the hotel and managed to wrap himself around her in a bear hug. She testified the two proceeded to the hotel. At the elevator, witness #2 asked Mr. Young if he had his keys and, as he looked for them, she extricated herself from his grasp and saw Mr. Jangula in the lobby. He asked if she was all right, and she replied no. Mr. Jangula then came over and took witness #2 out of the hotel and they went for a walk.

Mr. Jangula testified that, after he had assisted witness #1, he had gone to his room but at about 1:00 a.m., he went to the hotel lobby in search of a vending machine. As he entered the lobby, he saw witness #2 and Mr. Young near the elevator and Mr. Young was draped over witness #2. Mr. Jangula went to assist witness #2 and when he got there, he testified Mr. Young shoved him aside and muttered some incomprehensible words. Mr. Jangula testified witness #2 looked frightened and mouthed the words "please help me get out of here". At that point, he took her arm and led her out of the hotel.

Once out of the hotel, witness #2 burst into tears and tried to speak but Mr. Jangula said only bits and pieces were coming out. She appeared very upset, but eventually calmed down and said that she had been at the beach and had been pressured by fellow employees to take Mr. Young back to the hotel. She said she did not want to do it, but eventually she did. She said Mr. Young was drunk and difficult to maneuver and she had to fend off his advances as he was groping her.

Mr. Jangula and witness #2 walked for about one-half hour and he then escorted her back to her room, and he went to his room for the rest of the night.

Mr. Young testified that he commenced his employment with INAC in May 1985, and is currently an FSO, as he was in 1996. He attended the workshop and on September 17, it ended around 4:30 p.m. There were no scheduled events for the hours after that, and no overtime was paid to anyone for attending the workshop. Mr. Young went to dinner shortly after 5:00 p.m., then returned to the hospitality room and stayed until 10:30 p.m. or so, following which he and a number of colleagues went to another local bar. He testified that up to that point in time, he had consumed about three beers. He remained in the bar until it closed at about 12:30 a.m., and consumed another four beers in that two-hour span. A number of Mr. Young's colleagues were continuing their socializing at the beach; therefore he purchased 12 more beers and went along to the beach where six to eight colleagues were sitting around in a circle having a sing-a-long. He sat down between two colleagues and consumed three more beers in a 30-minute period. The two individuals he was sitting beside got up and moved about but Mr. Young testified that, as he had recently broken his leg and was still having difficulty walking, he remained seated. A number of other individuals were consuming alcohol at this point in time; Mr. Earl Fontaine's evidence supported this fact as well.

The grievor testified witness #1 never sat beside him and, in fact, he does not recall seeing her at the beach that evening. He is not sure why she testified she was there as he has a clear recollection of the events that took place that evening.

At about 2:30 a.m., the grievor testified he got up to leave and he was having difficulty walking in the sand. As he proceeded towards the hotel, he testified witness #2 caught up to him and grabbed his arm to assist him towards the hotel. Mr. Young testified witness #2 never sat beside him at the beach.

Mr. Young and witness #2 were walking towards the hotel and, he testified, she let him go and he proceeded a couple of steps behind her. At the side door to the hotel, Mr. Young said he got his hotel key out to open the door and he let witness #2 in and she went ahead to the elevator. Mr. Young said he saw Mr. Jangula at the elevator and told him they had just come from the beach. Mr. Young then entered the elevator and went to his room.

In cross-examination, Mr. Young said he consumed 10 to 12 beers that evening. He denied putting his arm around any other women that evening aside from the time witness #2 helped him off the beach. He also admitted to holding Ms. Gail Govereau-Asham's hand, although he said it was only for a few seconds, and he did this because she said her hands were cold; therefore he took them to warm them up.

Ms. Stella Pruse is an FSO and also attended the workshop. She said the normal hours of work consist of a seven and one-half-hour day and the workshop ended at about 4:30 p.m. on September 17. There was no set agenda for after hours and she had dinner after the end of the workshop and later went to the hospitality suite. From there, she proceeded to the local bar with a number of colleagues, and when it closed she went to the beach. She said departmental policy prevents consumption of alcohol on the job and, if anyone is caught drinking on the job, disciplinary action is taken. She said there was quite a bit of drinking going on at the beach.

Ms. Pruse testified she saw both witness #1 and witness #2 on the beach that evening while she was walking around and engaging in a few conversations with different individuals. She testified that she saw Mr. Young that evening and, when asked about his state of sobriety, she replied that he would not have been legally able to drive a car. She saw Mr. Young leave the beach and also said she saw witness #2 helping him as he walked towards his hotel. He had his arm around witness #2.

Mr. Nick Labay testified that he too was at the workshop and at the beach later in the evening of September 17. He did see witness #1 on the beach but could not recall seeing witness #2.

The employer's counsel wished to call rebuttal evidence and the grievor's counsel objected, saying their case had been closed. The employer's counsel said the grievor's story had changed over time and it was therefore necessary to present additional witnesses to rebut what Mr. Young had now testified to.

I allowed the employer's counsel to present rebuttal evidence, and the parties agreed as to what Ms. Leona Engele would say were she to testify. They agreed she would say Mr. Young put his arm around her on the beach the evening of September 17.

Ms. Gail Govereau-Asham testified that she too was on the beach that evening and she received a bear hug from Mr. Young. Later on, he tried to hold her hand on three occasions, but each time she pulled her hand away and told him to "bug off", using stronger terms each time he tried holding her hand.

Those are the events that took place on September 17, according to the various witnesses.

On September 18, witness #1 and witness #2 were speaking together and witness #2 said she understood Mr. Jangula had come to the rescue of witness #1, as well as to her rescue the previous evening. Witness #1 asked what she was referring to and witness #2 said she had had a problem with Mr. Young the evening before. Witness #1 said she was not surprised as she had had a problem with him as well. They travelled back to the office together and spoke of their feelings with respect to the above-cited events. Witness #1 said she commented she was upset and said she wanted to get rid of her breast and get a new one. She reiterated this comment to others, including Mr. Jangula, at a later date.

Witness #2 said that upon reaching the office in the late afternoon of September 18, she went to her sister's office and told her what had happened. Together they went to Personnel to speak to the Director, Ms. Nan Rice.

On September 19, the Director of Human Resources notified the Regional Director, Ms. Kustra, and said that allegations of sexual harassment were being made. She testified she was told the complainants were witnesses #1 and #2 and they alleged they received unwanted physical advances from Mr. Young.

Ms. Kustra testified she then reviewed the Treasury Board policy on harassment in the workplace (Exhibit E-2) as well as the departmental harassment policy (Exhibit E-3). The departmental policy requires a work environment free of harassment (see paragraph 7.1(a)) and, although there was no written complaint, Ms. Kustra stated it was incumbent on management to take action based on the information they had.

Ms. Kustra also identified Exhibit E-4, the "Departmental Code of Ethics" signed by Mr. Young on January 5, 1989. One item Ms. Kustra pointed out in this document states that employees must " - conduct themselves on duty and in public in a manner that will bring credit to them, their department, and the public service".

Ms. Kustra testified she asked the Director of Human Resources, as well as the Associate Regional Director General, to investigate the allegations. It was decided to have the investigation done by an independent investigator; consequently, the Department engaged the services of TLS Enterprises.

On September 20, Ms. Kustra contacted Mr. Young and asked him to meet her in her office. Mr. Young said that, as he did not know the purpose of the meeting, he brought along his work files. When he arrived at Ms. Kustra office, he was told witness #2 had charged him with sexual harassment. He stated he was totally stunned by this allegation and said she had been helping him while he was walking back to the hotel. He testified no mention was made about anything involving witness #1 at that meeting.

Ms. Kustra stated that after the meeting with Mr. Young ended both witness #1 and witness #2 were moved to another floor, and continued with their work.

Mr. Young could not believe the allegation and did not eat for three to four days afterwards. The second allegation of sexual harassment came in a few days later and was also part of the investigation. Mr. Young stated he had no idea why either

witness #1 or witness #2 would make these allegations as he had always gotten along with both of them. He said he was devastated by the allegations.

The incidents were investigated by TLS Enterprises. Mr. Young was among those people interviewed, and he stated that, prior to being interviewed, he received a letter (Exhibit E-7) from TLS Enterprises outlining the allegations made. TLS Enterprises submitted an Investigation Report on November 12, 1996 (Exhibit E-1). At the outset of the hearing, the employer's counsel stated that they were going to introduce this report through a management representative. Counsel for the grievor objected, saying it should be introduced by its author. Counsel for the employer said it was not being introduced for the truth therein but rather to simply show a report had been received by management. Counsel for the grievor consented to the report going in on this basis.

Ms. Kustra testified she received the Investigation Report (Exhibit E-1) and was satisfied with its completeness. After reviewing Exhibits E-1, E-2 and E-3, Ms. Kustra consulted with the Director of Human Resources, as well as officials in Ottawa (Headquarters), and it was decided to issue a ten-day suspension to Mr. Young. Ms. Kustra initially felt a lengthier suspension more appropriate, but took into account the grievor's 11-year discipline-free history before deciding on the final penalty.

The disciplinary letter (Exhibit E-5) was given to the grievor on November 28, 1996.

In cross-examination, Ms. Kustra stated most employees travelled to and from the workshop by a bus provided by the Department, but all were in travel status, and were expected to remain in Gimli for the duration of the workshop. Ms. Kustra agreed drinking in the workplace is not acceptable and stated that she considered the events took place in a work environment, in part because the nature of the workshop and its objectives continued throughout the duration of the workshop.

Employer's Argument

Counsel stated that the employer has shown, on the balance of probabilities, that the events occurred as stated in the notice of discipline. There was a workshop attended by the FSO's, the purpose of which was team building. All employees

attending were in travel status, and all expenses were paid in accordance with the Travel Directive.

The testimony revealed that Mr. Jangula had provided assistance to both witness #1 and witness #2 on the evening of September 17. Mr. Jangula was a credible witness and has no interest in the events. As such, he should be believed when he said both witness #1 and witness #2 appeared upset when he encountered them, and he reiterated what they had told him that evening. Their testimony at this adjudication hearing is consistent with what they told Mr. Jangula on the evening of September 17.

Both witness #1 and witness #2 testified clearly as to where they were on September 17. Ms. Stella Pruse testified she saw both witness #1 and witness #2 on the beach that evening and also that she saw witness #2 leave the beach, saying she had had enough. There should be no doubt both women were on the beach that evening in spite of the fact Mr. Young testified he did not recall seeing witness #1 on the beach on the evening in question.

The grievor admitted there was no reason he could think of for either witness #1 or witness #2 to fabricate such a story.

Both witness #1 and witness #2 saw the drunken stupor of Mr. Young and Ms. Pruse stated that, in her opinion, Mr. Young would have been too intoxicated to drive a car that evening.

Mr. Young said he did not touch anyone on the evening of September 17 apart from the assistance he was receiving from witness #2. Yet, it was established in rebuttal that he had hugged Ms. Engele and, furthermore, Mr. Young had tried to hold Ms. Gauverau-Asham's hand on three occasions in spite of being firmly told not to. This was contrary to his testimony, where he said he held her hand for only a few seconds and did so in response to her saying she was cold.

Counsel for the employer said the grievor was evasive, vague and constantly shifting in his testimony, and the evidence of the employer was credible.

With respect to the Treasury Board policy, there is zero tolerance on sexual harassment. In addition, the Code of Conduct, which the grievor signed, requires employees to conduct themselves in a manner satisfactory to the employer. Here, the

nature of the misconduct is serious. There was evidence of repeated touching, kissing, and an instance where Mr. Young grabbed the breast of witness #1. Management had an obligation to take action with respect to this harassment and counsel referred to *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84, a decision of the Supreme Court of Canada.

It is not uncommon to send employees away on training programs and the employer has the right to expect employees will conduct themselves as if they were at work.

In the alternative, counsel suggested the off-duty behaviour policies apply here and referred me to *Canadian Labour Arbitration*, (Third Edition), by Messrs. Brown and Beatty, section 7:3010.

I was also referred to the following cases: *Gravel* (Board file 166-2-21603); *Dell, Philipchuk and Sweeny* (Board files 166-2-25124 to 26 and 25189 to 91); *Kahlon* (Board file 166-2-20871); *Frankel* (Board file 166-2-23022); *Taylor* (Board file 166-2-26318); *Lagacé* (Board file 166-2-25915); and *Teeluck* (Board file 166-2-27956).

Grievor's Argument

Counsel for the grievor advanced a two-pronged argument, namely that whatever happened that night was not harassment or, secondly, that if I find there was harassment, it did not take place in a workplace or work environment and, as such, was not subject to discipline. Counsel stated the leading case in support of this latter proposition was *Cluff and Canadian Human Rights Commission* [1994] 2 F.C. 176, a decision of the Federal Court, Trial Division.

Counsel reviewed the evidence of Ms. Kustra who testified, emphatically, that alcohol was not allowed in the workplace. All the evidence suggests there was a lot of alcohol consumed after 4:30 p.m. on September 17, and no work-related activities were conducted after 4:30 p.m. In fact, counsel stated, there was no evidence from the employer to show that anything that took place after 4:30 p.m. was work-related. All witnesses supported the fact that there was no official agenda after 4:30 p.m. and the activities consisted of socializing. None of the activities, like drinking, partying and carrying on, could be considered as work-related. Therefore, whatever happened after

the workshop ended that day was not related to the workshop. As such, the employer had no control over the employees beyond 4:30 p.m. on September 17. People were free to do whatever they chose to do after 4:30 p.m., and the employer was not free to discipline them for any of these activities.

The evidence tendered by Mr. Young was clear. He said he had about 12 beers over the course of the evening, but he clearly remembered what happened that night. Witness #2 helped him to his hotel and he categorically denied touching her or harassing her in any way. He also said he did not recall sitting beside witness #1 while on the beach.

There was no suggestion the next day that harassment had taken place and, in fact, witness #2 waited until she got back to Winnipeg before anything happened. Neither witness #1 nor witness #2 ever filed a written complaint.

Rebuttal

There is no need for a written complaint in order to start an investigation into harassment (see Exhibit E-3, section 5.4). Mr. Young was presented with a written document by TLS Enterprises outlining the areas of alleged harassment (Exhibit E-7).

The *Cluff* decision (*supra*) does not apply in this situation as it dealt with an appeal of a Human Rights Tribunal decision. Furthermore, the Treasury Board policy does not limit situations requiring some action to the course of employment.

Reasons for Decision

The undisputed evidence showed Mr. Young to have been drinking on the evening of September 17, 1996. He conceded he had 10 to 12 beers that evening and Ms. Pruse expressed the opinion that he would have been too intoxicated to drive had he had to do so. Fortunately, there was no such requirement, but it is easy to conclude the grievor was inebriated on September 17 while attending the workshop in Gimli. As such, while he stated he clearly recalls the events that evening, I find it is highly probable his recollection is clouded by the consumption of alcohol. This finding would lead me to the conclusion that he was not lying about the events that took place on the beach, but rather his memory was, in fact, somewhat clouded due to the consumption of alcohol.

He testified that, as witness #1 was not on the beach that evening, nothing happened with her.

Witness #1 testified she was there and she was seen on the beach by Ms. Pruse, who was called as a witness for the grievor. Mr. Jangula testified he spoke to witness #1 when she returned from the beach and she was upset and confided in him.

I have no problem concluding witness #1 was, in fact, on the beach on September 17.

Witness #1 testified that Mr. Young squeezed her breast. No one testified that they actually witnessed this incident and Mr. Young denied the event.

A leading case in issues of credibility of witnesses is a decision of the British Columbia Court of Appeal: *Faryna v. Chorny* [1952] 2 D.L.R. 354 At page 357, O'Halloran, J.A. writes:

...

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

Mr. Young testified he got along well with both witness #1 and witness #2 prior to the incidents at the workshop. There was no apparent reason for them to lie about what took place, and I was not offered any explanation as to why they may have lied. Yet, that is what Mr. Young suggests. In order to assist in determining who is telling the truth, it is helpful to look at the consistency of the story with the evidence provided by others.

Mr. Jangula is a disinterested party. He has no ax to grind, so to speak, against anyone that I was told about. He appeared sincere while giving evidence, and gave it in a straightforward, uncontradicted fashion. He stated he encountered witness #1 about

12:30 a.m. in the lobby of the hotel and she appeared distraught. She asked for assistance and he escorted her out of the hotel. She explained she was upset because a manager had been physically groping her. While she did not mention the fact that Mr. Young had squeezed her breast during that discussion, he testified she did relate the incident to him the following day back at the office. He testified she had stated to him she felt dirty and wanted to remove her breast due to the action of Mr. Young. Expressing such a sentiment would, I believe, be most unlikely if the event had not, in fact, taken place as stated. The fact witness #1 did not mention this specific event to Mr. Jangula on the evening of September 17, that is the evening the event allegedly took place, is not, in these circumstances, an indication that the event did not occur. Witness #1 was distraught over the unwanted advances of a manager, as well as the action of Mr. Young. I find it was just a matter of degree here, and witness #1 was more distraught about the advances of the manager, which were persistent throughout the evening, than she was, at that time, with respect to Mr. Young's action. However, that does not mean she regarded Mr. Young's action as acceptable. Quite the contrary. The evidence indicated she was upset about the fact Mr. Young had squeezed her breast, so much so that she spoke about wanting to remove her breast.

I find, on the balance of probabilities in light of the evidence presented to me, that this alleged incident took place.

Witness #2 stated Mr. Young kissed her on the cheek twice, in spite of the fact she told him not to after he initiated the first kiss. Mr. Young denies this took place.

Again I turn to the evidence of Mr. Jangula to determine the probability of whether or not the events, as alleged, took place. Mr. Jangula encountered witness #2 in the lobby of the hotel, in close proximity to the elevator, with Mr. Young holding on to her. Mr. Jangula testified she appeared distraught, and when he approached her she mouthed the words "please help me". He also testified Mr. Young muttered something incomprehensible. Mr. Young testified he accompanied witness #2 to the hotel, as she was assisting him, and he simply walked to the elevator and got in to go to his room. Again, I was given no reason why witness #2 would lie about the events that took place, and her evidence was consistent with that of Mr. Jangula.

I was also told Mr. Jangula assisted witness #2 out of the hotel and they proceeded to walk, with Mr. Jangula trying to calm her down. She told Mr. Jangula that she had had to fight off Mr. Young's advances. The two walked for about 30 minutes and Mr. Jangula escorted her back to her hotel room. There was no reason for witness #2 to lie about these events, and her demeanour suggested something had taken place. I find, here too, that on the balance of probabilities, the alleged events did take place.

I therefore reject the first position taken by counsel for the grievor, which was that the events as alleged did not occur. I find otherwise.

The secondary position advanced by counsel for the grievor was that the events, if they did occur, happened outside the work environment and the employer can not discipline the grievor for this. Counsel referred me to what he said was the leading case for this position and that was *Cluff and Canadian Human Rights Commission* (supra), a decision of the Federal Court, Trial Division. This case concerned an application for judicial review of a Human Rights Tribunal decision, which said the Tribunal lacked jurisdiction to investigate because the alleged sexual harassment did not take place in the course of employment. The Trial Division dismissed the application for review. Counsel for the employer pointed out this was a Federal Court decision in relation to a decision of the Canadian Human Rights Tribunal, which was dealing with the *Canadian Human Rights Act*. Definitions of harassment found in the *Canadian Human Rights Act* are, in the instant case, subsumed by the Treasury Board policy on harassment, and the Treasury Board policy extends even further than the *Act*. The policy does not limit harassment to the course of employment.

To accept the proposition advanced by counsel for the grievor would be to negate the principle that, in certain situations, employers can discipline employees for inappropriate off-duty conduct.

In *Canadian Labour Arbitration* (supra), authors Brown and Beatty write, at 7:3010:

Off-duty behaviour

...unless the act or condition complained of detrimentally affects the employer's reputation, renders the employee unable to properly discharge his employment obligations,

causes other employees to refuse or be reluctant to work with that person, or inhibits the employer's ability to efficiently manage and direct the production process, an employer may not properly discipline an employee for misconduct committed during his off-duty hours. Arbitrators have recognized that unless a substantial and legitimate business reason exists, the employer has no authority, control, interest or jurisdiction over an employee's behaviour outside the hours of his employment....

To state the proposition another way would be to say that employees may properly be disciplined for off-duty misconduct, depending on the circumstances.

Therefore, provided they are work-related, I reject counsel for the grievor's secondary argument that employees are not subject to discipline for activities that occur after their workday is done.

In any disciplinary situation, a trier of fact must determine if the actions alleged do, in fact, warrant discipline.

The letter of discipline states that Mr. Young "...engaged in inappropriate behaviour for which disciplinary action is warranted. The behaviour demonstrated by [you] is in violation of the departmental Harassment Prevention Policy and is clearly unacceptable." (see Exhibit E-5)

Both the Treasury Board and departmental policies on harassment define harassment and sexual harassment as follows (see Exhibits E-2 and E-3):

Appendix A
Definitions

Harassment means any improper behaviour by a person employed in the Public Service that is directed at, and is offensive to, any employee of the Public Service and which that person knew or ought reasonably to have known would be unwelcome. It comprises objectionable conduct, comment or display made on either a one-time or continuous basis that demeans, belittles, or causes personal humiliation or embarrassment to an employee.

It includes harassment within the meaning of the Canadian Human Rights Act, i.e. harassment based on the following prohibited grounds of discrimination: race, national or ethnic origin, color, religion, age, sex, marital status, family status, disability or condition or an offense for which a pardon has been granted.

Sexual harassment means any conduct, comment, gesture or contact of a sexual nature, whether on a one-time basis or in a continuous series of incidents;

- (a) that might reasonably be expected to cause offense or humiliation to any employee; or
- (b) that the employee might reasonably perceive as placing a condition of a sexual nature on employment or on an opportunity for training promotion.

...

The Departmental Code of Ethics (Exhibit E-4), which Mr. Young signed as receiving in 1989, states, in part:

...

- conduct themselves on duty and in public in a manner that will bring credit to them, their department, and the public service;

...

I have no difficulty in finding the actions of Mr. Young would fall within the ambit of sexual harassment, as that term is defined in Government policy documents cited above. When Mr. Young squeezed witness #1's breast, he, in my opinion, exhibited behaviour or conduct of a sexual nature that might reasonably be expected to cause offense or humiliation to her. There was absolutely no indication that such advances would be welcome.

Similarly, kissing witness #2 was unwelcome. She stated as much after the initial contact, yet he initiated another kiss. I note a similar finding was made by Arbitrator Hope in *Re Canadian Broadcasting Corporation and Canadian Media Guild* (1998) 70 L.A.C. (4th) 44. At page 86 of the decision, Arbitrator Hope writes, with respect to an allegation of a forcible attempt to kiss a fellow employee:

... the Employer confronted conduct amounting to sexual assault that it was justified in addressing under Article 14.

The departmental harassment prevention policy (Exhibit E-3) states, at paragraph 6.1(a):

6.1 *Policy Statement*

(a) *Harassment in any form, is serious misconduct that shall be subject to disciplinary sanctions, ...*

The policy also states, at paragraph 6.1(c) that:

(c) *All managers are committed to ensuring that the work environment is free of harassment.*

The Treasury Board policy (Exhibit E-2) at page 1 states that:

Deputy heads must:

1. *provide a work environment free of harassment...*

Therefore, I find there is a clear obligation on the employer to ensure harassment does not occur at the workplace, and to take action if it does. In this instance, I find the employer had to take action with respect to the harassment exhibited by Mr. Young in his off-duty conduct, as the action took place during an employer sanctioned training program while employees were being paid expenses under the relevant provisions of the Travel Directive. In addition, these individuals all worked together in the Funding Services Directorate and Mr. Young's actions necessitated the movement of witness #1 and witness #2 to another area in order to minimize their contact with him.

Finally, I must decide whether the quantum of a 10-day suspension was justified in the circumstances. The employer took into account the grievor's lengthy, discipline-free work history before deciding on the 10-day suspension. Indeed, Ms. Kustra suggested but for that fact, the suspension would have been higher.

In *Gravel* (supra), former Vice-Chairperson L.M. Tenace reduced a discharge to a suspension of approximately one year for sexual and personal harassment. In *Taylor* (supra), Board Member R.V. Simpson upheld a discharge for what was deemed to be sexual assault, which included kissing and fondling. I realize that the events in each of these two cases may be regarded as more severe than in the instant case but, in proportion, I do not find a 10-day suspension to be out of line for the events that took place. The employer recognized the mitigating factors when deciding on the penalty and I see no reason to reduce it further. The grievance is therefore denied.

I would like to make one final comment. It appears that the actions of Mr. Young were out of character and one can only presume that they can be attributed, to some degree, to an excessive consumption of alcohol.

I heard nothing to suggest that, in a normal workplace setting, Mr. Young would be an individual likely to harass someone else. In fact, quite the contrary. Witnesses agreed that, in a normal workplace setting, Mr. Young went about his job in a satisfactory manner and, in fact, was quite jovial. I would hope that everyone can put these incidents behind them and return to a productive and fully functioning work unit. While we can not change events that have taken place, we can certainly learn from them. What we can learn here is that the actions were unacceptable and discipline was warranted. However, the actions were out of character and, I sincerely hope, will not be repeated.

**Joseph W. Potter,
Deputy Chairperson**

OTTAWA, August 4, 1999