**IN THE MATTER OF** an adjudication pursuant to
section 46 of the *Human Rights Act*, S.N.W.T. 2002, c. 18 as amended

**AND IN THE MATTER OF** a complaint filed by Patricia Sherman against
Mbotloxo Investments Ltd. operating as Boston Pizza

## INTRODUCTION

This is an adjudication following a complaint filed by Patricia Sherman ("Sherman") against Mbotloxo Investments Ltd. operating as Boston Pizza ("Mbotloxo").

The complaint was filed on November 18, 2005, and in it, Sherman alleges that Mbotloxo refused to continue to employ her or discriminated against her in regard to employment or a condition of employment on the basis of sex, age, or disability and contrary to sections 5 and 7 of the Northwest Territories *Human Rights Act* (the "Act"). She also alleges that Mbotloxo harassed her in matters related to employment on the basis of age, sex and disability and contrary to sections 5 and 14 of the Act. She also alleges that Mbotloxo retaliated against her because she attempted to make a complaint under the Act, contrary to section 15 of the Act. By letter dated March 29, 2007, the Director of Human Rights (the "Director") referred the complaint to the Northwest Territories Human Rights Adjudication Panel pursuant to section 46 of the Act.

This matter was heard in Yellowknife, Northwest Territories, on April 28, 2008. The Northwest Territories Human Rights Commission (the "Commission") did not participate in the hearing. Sherman represented herself, and Mr. Brad Baker ("Baker") and Mr. Anthony Chang ("Chang") represented Mbotloxo.

## LEGISLATIVE SCHEME

The Act is intended to deter and eradicate unlawful discrimination in the workplace; in the provision of goods and services; and in the provision of accommodations.

The Act establishes the Commission, which has the role of promoting human rights throughout the Northwest Territories; developing educational materials on the issue of human rights; developing human rights policies; and creating the office of the Director.

Section 46 of the Act requires that the Director refer a complaint to the Adjudication Panel for adjudication if the Director is of the opinion that the parties to the complaint are unable to settle the complaint, and the complaint should not be deferred (s. 43) or dismissed (s. 44).

Section 62 of the Act sets out the decision making power of the adjudicator after the completion of a hearing. If the adjudicator finds the complaint is without merit, the complaint shall be dismissed [s. 62(2)]. If the adjudicator finds that the complaint has merit, the Act provides for a variety of remedies [s. 62(3)]. A decision of an adjudicator can be filed with the Clerk of the Supreme Court [s. 64(1)] and can be enforced in the same manner as an order of the Supreme Court [s. 64(2)].

## BACKGROUND

*Testimony of Sherman*

Sherman gave testimony on her own behalf. It is important to note that Sherman made a request for numerous Notices to Attend, and these Notices to Attend were issued and provided to her. However, in the course of her presentation, Sherman advised that she did not serve the Notices to Attend, and no one else testified on her behalf.

Sherman testified as follows:

- Sherman testified that in November, 2003, she began working in the kitchen of Boston Pizza. Sherman testified that, prior to being hired, she discussed working conditions with Chang. According to Sherman, she advised Chang that she had back problems, and could not stand for long periods of time. Chang agreed that she would be given a work station with a stool, in order that she could carry out her duties.

- Sherman indicated that, within a few days of commencing work, she found that other staff were playing compact discs ("CD's") that she found offensive. She described the CD's as containing vulgar and sexual comments such as "mother fucker", "kiss my ass", "suck my big stick", and "feeling pussy". Sherman indicated that she complained to Jeremy Ball ("Ball"), a manager of Boston Pizza at the time, and he advised staff not to play CD's while Sherman was in the

kitchen. Sherman stated that she complained about this issue a number of times over the next 1 ½ years, and felt that Ball was becoming annoyed with her. She also stated that Ball was not always on the premises.

- Sherman testified that in December, 2004, she spoke to Debra McLeod, Deputy Director of the Commission, and asked if anything could be done about the CD issue.

- Sherman testified that in February, 2005, she and some coworkers (Emmanuel Ruiz, Ramiel, and Steve Camsell) went to see Ball to talk about the CD issue. Her sense was that Ball was annoyed, and he told them to see Yannick Laroque ("Laroque"), who would be co-managing Boston Pizza. The group advised Ball that they would be filing a complaint with the Commission.

- Sherman testified that, after Ball left his employment with Mbotloxo, Laroque did nothing to stop offensive CD's from being played. Sherman also stated that her stool would be hidden when she came into work, and would be found in places such as the freezer, ceiling, and beer bottle storage area. She also stated that coworkers would laugh and make fun of the situation.

- Sherman stated that on March 7, 2005, she met with Laroque and advised him that she was being tormented by staff and was offended by the CD's. According to Sherman, Laroque was noncommittal in terms of taking any action.

- Sherman testified that on March 7, 8 and 9, 2005, her stool was missing. She stated that, at one point, she stopped Laroque and asked him to help her find the stool, and that he responded by laughing.

- Sherman testified that on March 10, 2005, she could not find her stool anywhere, and gave a letter to Laroque outlining her concerns. The letter was received in evidence without objection, and states, in part:

> "... Trevor and Bjorn see fit to use the "f" word in practically every sentence and/or phrase that they utter. Sometimes the "F" word is the sentence. Even when they're not saying it, the rest of us still have to listen to it constantly, under the guise of "music". The material is nothing short of verbal pornography. We hear such gems as "mother fucker', "kiss my ass", "suck my big stick"...

... Bjorn made a point of walking past me while uttering “Suck my big dick”. I shouldn’t have to be subjected to such garbage. ...

... On Tuesday afternoon, there was a bad batch of dough made. Bjorn came over and started rolling it into “dough penises”. ...

... As a manager, you have the ability to put a stop to this. As an employer, you also have a moral duty, if not legal obligation, to protect your personnel from abuse. Verbal abuse is not less offensive than physical abuse. Please deal with this matter. ...”

As well, a letter dated March 11, 2005, from Rae Celotti, Program Coordinator at Employability, was tendered into evidence without objection. Employability is an organization that assists with employment services for the disabled, and the letter states, in part:

“... This past week, two male staffs in the kitchen have been taking and hiding the stool that Patricia uses. This has caused Patricia considerable stress as she has to go on the hunt for the stool every day when she comes into work. When she asks the staff if they have seen her stool they both deny seeing the stool. When all along they are the ones who have hidden it. As the manager I am requesting your further investigation in this matter and rectify any issues that can be found. ...

... Patricia has also mentioned that she as well as other staff members are being subject to foul language in the workplace. This seems very upsetting as well. ...”

- Sherman testified that in mid March, 2005, she met with Laroque and Baker, who was then a manager at Boston Pizza. Sherman stated that during the meeting, Laroque agreed to make sure that Sherman’s stool was not taken, but that he refused to be the “language police”.

- Sherman stated that she met with Baker in mid April, 2005, in regard to the CD issue, and left the meeting feeling that Baker would not do anything.

- Sherman testified that by April and May, 2005, a coworker, Bjorn, was becoming increasingly aggressive, and that he would fill the counter top with prepared food, and complain that Sherman was in the way. Further, Sherman stated that Bjorn was the only prep cook who will fill the counter top with prepared food, instead of taking completed trays of food and putting them in the fridge.

- Sherman testified that on May 9, 2005, Baker advised her that she could no longer work in the kitchen, and that she could work upstairs

in the office, folding boxes.

- Sherman testified that on May 10, 2005, Baker advised her that she would have to provide him with a doctor's note in regard to her back problems before she could continue working. In response, Sherman provided a letter from Dr. J. Tan, which was accepted into evidence without objection. The note states, in part:

> "... This is in regards to her having a stool during her work. She states that her work involves preparing food and periods of prolonged standing. As a result of her chronic lower back pain, she is unable to tolerate prolong periods of standing. I think that having a stool may help to alleviate her low back pain at work. ..."

  According to Sherman, Baker found that note from Dr. Tan to be unsatisfactory, and advised Sherman that she could go back to work if Dr. Nancy Fraser, Sherman's regular doctor, provided a more detailed note. Sherman stated that she provided Baker with a note from Dr. Fraser, dated June 8, 2005. The letter was accepted into evidence without objection, and states, in part:

> "... Ms. Sherman has asked for a medical letter supporting her ability to do her job as a pizza/food delivery person, which also includes kitchen chores. I do not have a written job description nor am I able to perform a functional capacity assessment in the clinic setting. ...
>
> ... Ms. Sherman has chronic low back pain which is under investigation. She states she is able to do her usual work including lifting up to 10 - 12 kg including about 10 kg overhead. ..."

- According to Sherman, she went on holidays, and then met with Baker and a representative from Employability on August 5, 2005. Sherman testified that, during that meeting, Baker indicated that the letter from Dr. Fraser was still inadequate, and that he would require a letter from a specialist. Sherman stated that she provided Baker with a letter from Dr. Glasgow, an orthopaedic surgeon, dated August 16, 2005. The letter was admitted into evidence without objection, and states, in part:

> "... Has L4-5 disc wear (mild) and it causes her discomfort - her job is beneficial for her and will need a stool occasionally..."

- Sherman testified that, shortly after providing the letter from Dr. Glasgow, she was advised that her position at Boston Pizza had been

eliminated, and that she could work as a hostess, or do office work. According to Sherman, her back problems would not allow her to fill the position of hostess. Further, she stated that Baker indicated that the office position would only be 5 or 6 hours per week, and this was not enough work time. Sherman never did return to work, and sought other employment.

*Testimony of Baker*

Baker gave testimony on behalf of Mbotloxo. He did not take issue with much of Sherman's testimony, and her version of events. In particular, he did not refute that CD's with explicit lyrics had been played in the kitchen at Boston Pizza, or that Sherman's stool would be hidden on her by other employees. However, he did have a different perspective on some of the events:

- Baker acknowledged that he knew the playing of CD's with explicit lyrics was an issue. He stated that, when he became a manager in 2005, he directed that no CD's be played in the kitchen unless all staff on duty agreed with the playing of the CD. Otherwise, only the radio could be listened to in the kitchen.

- Baker indicated that the fact that Sherman's position was eliminated had nothing to do with her personally. Rather, according to Baker, when he became manager in the spring of 2005, there were significant issues with the way the restaurant was being operated. More specifically, he stated that the restaurant was not being operated in accordance with Boston Pizza franchise standards and quality expectations. As a result, there was a total reorganization of the kitchen staff, including the elimination of all food preparation positions, and staff was cut in half. This included Sherman's position.

- Baker disagreed with how Sherman characterized the options given to her for alternative positions. He indicated that the office work position would be approximately 25 - 35 hours per week, and this was made known to Sherman. He testified that there was a substantial amount of office work to be done, and indicated that Boston Pizza continues to look for office staff. He encouraged Sherman to apply, if she was still interested.

**ANALYSIS**

In her complaint, Sherman alleges that she was discriminated against in regard to her employment or a condition of employment on the basis of age, sex, or disability. Further, she alleges that she was harassed during the course of her employment on those same prohibited grounds. The issue of age discrimination or harassment on the basis of age were not raised in the course of Sherman's testimony, and I do not find that I need to delve into those issues further in coming to a decision in this case. As well, Sherman did not, in my view, bring any evidence forward that she was retaliated against by Mbotloxo when she attempted to file a complaint. As such, I will not deal with that issue. Given all of this, the fact scenario leaves four other issues to be addressed:

- Did Mbotloxo refuse to continue to employ Sherman and discriminate against her during the course of that employment or any term or condition of that employment on the basis of sex?

- Was Sherman harassed in matters related to her employment with Mbotloxo on the basis of sex?

- Did Mbotloxo refuse to continue to employ Sherman and discriminate against her during the course of that employment or any term or condition of that employment on the basis of a disability?

- Was Sherman harassed in matters related to her employment with Mbotloxo on the basis of a disability?

In answering these questions, I find that Baker's testimony was compelling. He was straightforward and sincere. In contrast, Sherman was scattered and unclear. Therefore, where Sherman's version of events differs from that of Baker, I accept Baker's version of events.

**Did Mbotloxo refuse to continue to employ Sherman and discriminate against her during the course of that employment or any term or condition of that employment on the basis of sex?**

Section 7(1) of the Act states:

> "7.(1) No person shall, on the basis of a prohibited ground of discrimination,

> (a) refuse to employ or refuse to continue to employ an individual or a class of individuals; or
> (b) discriminate against any individual or class of individuals in regard to employment or any term or condition of employment."

In my view, there was absolutely no evidence put before me to suggest that Mbotloxo refused to continue to employ Sherman on the basis of sex. Nor was there any evidence that she was discriminated against during the course of her employment or any term or condition of employment on the basis of sex. I therefore find that I do not need to delve further into this issue.

**Was Sherman harassed in matters related to her employment with Mbotloxo on the basis of sex?**

Section 14 of the Act states:

> "14.(1) No person shall, on the basis of a prohibited ground of discrimination, harass any individual or class of individuals
> (a) in the provision of goods, services, facilities or accommodation;
> (b) in the provision of commercial premises or residential accommodation; or
> (c) in matters related to employment.
> (2) In subsection (1), "harass", in respect of an individual or class of individuals, means to engage in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome by the individual or class."

Further, section 1 of the Act defines discrimination to include "...the conduct described in section[] 14". In other words, sexual harassment is sexual discrimination, and this seems to be the crux of Sherman's complaint.

Section 14 has three requirements to be met in order to prove sexual harassment. First, the harassment must be vexatious and relate to the prohibited ground of discrimination known as "sex". Second, there must be a course of conduct, and certainly more than one incident. Third, the conduct must be unwelcome, or ought reasonably to be known to be unwelcome. There is ample case law on the issue of sexual harassment that clarifies these principles:

*vexatious comments or conduct of a sexual nature*

In *Janzen* vs. *Platy Enterprises Ltd.* (1989), 59 D.L.R. (4$^{th}$) 352, the Supreme Court of Canada considered what constitutes sexual harassment. The Supreme Court of Canada stated:

> "... Emerging from these various legislative proscriptions is the notion that sexual harassment may take a variety of forms. Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity. This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particularly blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and **inappropriate comments**, but where no tangible economic rewards are attached to involvement in the behaviour..." [emphasis added]

Imposition of a "sexualized atmosphere" was found to be sexual conduct and harassment in the case of *Mahmoodi* v. *University of British Columbia* (1999), 36 C.H.R.R. D/8 (B.C. Hum. Rts. Trib.). Further, the concept of sexual harassment, and the creation of a hostile work environment for women, was considered in the case of *Commission des Droits de la personne et des Droits de la Jeunesse and Quebec (Procureur General)(Re)* (1998), 36 C.H.R.R. D/27 [1998] (Que. H.R.T.). In that case, the tribunal noted:

> "... Harassment ... can manifest itself in many ways **ranging from crude language, jokes, innuendoes, offensive remarks, rebuffs, bullying, taunting and insults to threats, assault or other aggressive behaviour, as well as caricatures,** graffiti, and vandalism ... The work environment has its own code of conduct which tends to reinforce the prejudice and stereotypes which in turn translate into an abuse of power. Moreover, incidents with sexist overtones are often further compounded by behaviour which amounts to retaliation against the victim..." [emphasis added]

The comments on the CD's were undoubtedly of a sexual nature, and certainly objectified and degraded women. Sexually explicit and offensive remarks made by staff were of the same nature. Further, making penises out of dough was certainly a sexually suggestive act, and could be perceived as threatening and degrading.

*ongoing conduct*

Sexual harassment, as defined in the Act, requires a "course of conduct", and that an isolated incident will not constitute harassment. In *Rampersadsingh* v. *Wignall (No. 2)*, 45 C.H.R.R. D/327 (C.H.R.T.) the tribunal stated:

> "... As the Supreme Court of Canada stated in *Janzen*, in order to come to a finding of harassment, it must be demonstrated that the conduct of a respondent

> was such as to have detrimentally affected the work environment. A certain level of seriousness or repetition in the conduct is required for such a hostile or poisoned environment to develop. ... it must be persistent and frequent in order to constitute harassment ...."

In this case, the conduct in question went on for 1 ½ years, until Baker became manager and determined to do something about it by implementing a policy to deal with the playing of CD's.

*unwelcome conduct*

In *Noffke* v. *McClaskin Hot House*, (1989), 11 C.H.R.R. D/407(Ont. Bd. Inq.), the Board of Inquiry stated that:

> "... Comment or conduct "that is known or ought reasonably to be known to be unwelcome" imports an objective element into the definition of harassment. The fact that this particular complainant found the behaviour vexatious is not sufficient. ...
>
> ... A complainant who clearly indicates to the respondent that his actions were unwelcome will more likely be able to satisfy the condition that the respondent knew the behaviour was unwelcome...
>
> ... I would add that any clear indication that the behaviour is unwanted should satisfy the test of "ought reasonably to know", unless perhaps if the rejection is contradicted ..."

In the case at hand, Sherman made it very clear, both verbally and in writing, that the behaviour was unwelcome, and went so far as to advise that she was contemplating filing a human rights complaint. None of this appears to have had any effect until Baker became manager.

Putting all of this together, the vexatious nature of the comments and conduct by staff; the ongoing course of this conduct, and the unwillingness of supervisors to deal with this issue in a concrete fashion for a significant period of time; and the clear indication from Sherman that the conduct was unwelcome, I find that Sherman was sexually harassed during the course of her employment with Mbotloxo.

**Did Mbotloxo refuse to continue to employ Sherman and discriminate against her during the course of that employment or any terms or condition of that employment on the basis of disability?**

Just as it is against the Act to discriminate against someone on the basis of sex, so it is against the Act to discriminate against someone on the basis of a disability.

"Disability", as defined in section 1 of the Act, includes "any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness". From a review of the evidence, it seems clear that Sherman had some back pain at the time she took a job at Boston Pizza, and this could certainly be classified as a disability. Further, although the extent of Sherman's disability may have been unclear at the time of hire, it seems that Chang conceded that Sherman had some disability, and had no problem with providing her with a stool to use when performing her duties. Further, I see no indication that Sherman's ongoing employment was in jeopardy due to her disability. In fact, the testimony of Baker was that Mbotloxo continues to look for employees, and encouraged Sherman to reapply.

Sherman argues that Baker told her that she could no longer have her job in the kitchen at Boston Pizza. In her evidence, Sherman seemed to suggest that this was due to her disability. However, as already indicated, I accept the evidence of Baker on this point - the whole kitchen at Boston Pizza was being reorganized, and Sherman's position was eliminated as a result of that reorganization. She was offered alternative employment doing bookkeeping or as a server. Sherman found the server option to be unsatisfactory, given her back condition. This may be understandable. However, she turned down the bookkeeping job, claiming it was only 5 - 6 hours per week and therefore, would not be enough hours. Again, I accept Baker's version of events, that the job would have been approximately 25 - 35 hours per week, and this was made known to Sherman.

In all, I find that officials with Mbotloxo hired Sherman knowing of her disability, and were prepared to accommodate that disability by providing her with a stool. When her position in the kitchen was eliminated, she was offered comparable employment, including a position that would allow her to perform her duties while sitting down.

It should be noted that the extent of Sherman's disability remained unclear during the course of her employment. The letters from Dr. Tan and Dr. Fraser were vague, at best. The letter from Dr. Tan only states that "having a stool **may** help alleviate [Sherman's] back pain" [emphasis added]. In Dr. Fraser's letter, it states that Sherman's "chronic lower back pain is under investigation", but has no further details at that time. It is not until the letter of Dr. Glasgow, an orthopaedic surgeon, that a diagnosis is made, and a concrete recommendation to accommodate

Sherman by occasional use of a stool is made. In my opinion, Baker was within his right, as a manager, to request further information on the extent of Sherman's disability to determine the appropriate accommodation needed for her. I see this as part of Baker's efforts to run Boston Pizza more professionally.

**Was Sherman harassed in matters related to her employment with Mbotloxo, on the basis of disability?**

The fact that Sherman was not directly discriminated against based on a disability does not answer the question of whether or not she was harassed on the basis of a disability.

The case of *Boehm* v. *National System of Baking Ltd.*, (1987), 8 C.H.R.R. D/4110, makes it clear that harassment is not limited to the concept of sexual harassment, but may extend to harassment in regard to other prohibited grounds of discrimination, including disability. In that case, a supervisor singled out a developmentally handicapped employee and called him names such as "dummy" and "retard".

The same principles apply to allegations of harassment based on a disability as apply to allegations of harassment based on sex:

*vexatious nature of conduct or comments relating to a disability*

In the *Boehm* case, the Ontario Board of Inquiry stated that:

> "... to be vexatious, the comment or conduct must cause vexation, that is, be irritating, annoying or distressing."

There is no doubt that removing Sherman's stool, a stool she required for work purposes, would annoy and distress her. Further, to have to ask for help to find the stool would be even more upsetting. Last, when she asked supervisor, Laroque, for assistance in finding the stool, and he laughed at her, this would be embarrassing. There is no excuse for such behaviour.

*ongoing course of action*

The act of taking Sherman's stool was not an isolated event. It went on for an extended period of time, without any concrete action being taken to stop this activity.

*unwelcome*

The act of taking Sherman's stool was clearly unwelcome, based on the evidence she gave. This is particularly true when she directly asked Laroque for assistance in finding the stool.

I find the actions of the staff that were involved in this twisted "game", and the reaction of Laroque to be unacceptable, and to fall within the definition of harassment based on a disability. Therefore, Sherman was, in fact, discriminated against based on a disability and contrary to sections 5 and 14 of the Act.

**Vicarious Liability**

As indicated, I find that Baker and Chang were upfront and sincere with the commission, and were not personally involved in the harassment. Nonetheless, 71(2) of the Act states:

> "71.(2) Any act of thing done or omitted by an officer, official or agent of an employees' organization or occupational organization within the scope of his or her authority to act on its behalf shall be deemed to be an act or thing done or omitted by the employees' organization, employer, employers' organization or occupational association, as the case may be."

Further, the case of *Robichaud* v. *Canada (Treasury Board)*, (1987), 40 D.L.R. ($4^{th}$) 577, makes it clear that human rights statutes impose an absolute statutory liability upon employers for work-related sexual harassment, even where the employer was unaware of the events in question. In *Robichaud*, it was made clear that an employer is in the best position to remedy the effects of discrimination and to provide effective solutions to issues that arise. The principles in *Robichaud* have equal applicability to the issue of harassment based on disability.
Given the statute and these principles, Mbotloxo is liable for the actions of its employees, and this serves as a reminder to employers who are not attentive to human right issues, or who do not deal effectively with human rights issues in the workplace.

**DECISION**

Based on all of the above, I find that Sherman was discriminated against by Mbotloxo during the course of her employment, on the basis of the prohibited grounds of sex and disability, and contrary to sections 5 and 14 of the Act.

## REMEDY

Section 62(3) of the Act outlines the powers of an adjudicator where a complaint is found to have merit. Section 62(3) states, in part:

> 62. (3) If the adjudicator finds, under subsection (1), that a complaint has merit in whole or in part, the adjudicator
>
> (a) may order a party against whom a finding was made to do one or more of the following:
>
> (i) to cease the contravention complained of,
>
> (ii) to refrain in the future from committing the same or any similar contravention,
>
> (iii) to make available to any party dealt with contrary to this Act the rights, opportunities or privileges that the person was denied contrary to this Act,
>
> (iv) to compensate any party dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act,
>
> (v) to pay to any party dealt with contrary to this Act an amount that the adjudicator considers appropriate to compensate that party for injury to dignity, feelings, and self respect,
>
> (vi) to reinstate in employment any party dealt with contrary to this Act,
>
> (vii) where the adjudicator finds that the party acted wilfully or maliciously, or has repeatedly contravened this Act, to pay to any party dealt with contrary to this Act an amount not exceeding $10,000.00 as exemplary or punitive damages,
>
> (viii) to take any other action that the adjudicator considers proper to place any party dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act; and
>
> **(b)** may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Act."

First, I make a declaratory order that the conduct complained of is harassment under the Act.
Second, I am making an order that Mbotloxo refrain from committing the same contravention in the future, and take all necessary steps to ensure that such discrimination does not happen again. This may include the development of a policy regarding the playing of music in the restaurant and sensitivity training around the needs of disabled persons. As I previously stated, I believe Baker and Chang were very sincere during the hearing, and I leave it to Mbotloxo to evaluate the current situation in the restaurant and determine what steps may need to be taken.

Third, I order that Mbotloxo pay Sherman the amount of $1000.00 in compensation for the injury caused to Sherman's dignity, feelings and self-respect. It is absolutely unconscionable that Sherman was subjected to sexually explicit music for a year and a half, and had to suffer the humiliation of having to search for a stool that was hidden from her. I appreciate that Baker took steps to rectify the situation, but that was after a significant lapse of time.

Fourth, I order that Mbotloxo pay the amount of $2500.00 in punitive and

exemplary damages to Sherman. This is to ensure that the message is clear that harassment in the workplace is unacceptable. Ultimately, employers must take steps to ensure that the work environment is safe from harassment. Further, in this case, supervisors knew of the issues, and yet failed to deal with them until Baker came along. One supervisor, Laroque, was, in fact, part of the problem and employers will be dealt with more severely in such cases. In *Shaffer* v. *Canada (Treasury Board)*, (1984), 5 C.H.R.R. D/2315 (Can. Rev. Trib.), the Tribunal stated:

> "... we are prepared to distinguish between liability of the employer arising from the conduct of supervisory personnel, as opposed to that arising from the conduct between co-workers. All of the authorities provided to us involved prohibited conduct by people in authority to personnel under them as a primary factor.
>
> If this same conduct had been done by supervisory personnel rather than by a co-worker, we would have found a contravention of the Act by the employer and held him liable.
>
> This is not to say that the employer could not be liable for discriminatory conduct between co-workers. It is merely to point out that the response required by the employer must be in proportion to the seriousness of the incident itself. By its very nature, prohibited conduct by a supervisory officer is more serious. This fact cannot be ignored when determining liability ..."

Mbotloxo will have sixty days to make the compensation and damage payments to Sherman. These payments are to be made through the office of the Human Rights Adjudication Panel.

Dated this _____ day of June, 2008.

_____

Shannon R. W. Gullberg
Human Rights Adjudicator