



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Sheryl (a.k.a. Sheri) McConaghie

Applicant

-and-

Systemgroup Consulting Inc.

Respondent

DECISION

Adjudicator: Ruth Carey
Date: March 6, 2014
File Number: 2012-11560-I
Citation: 2014 HRTO 295
Indexed as: **McConaghie v. Systemgroup Consulting Inc.**

APPEARANCES

Sheryl (a.k.a. Sheri) McConaghie, Applicant))))	Philip R. White, Counsel
Systemgroup Consulting Inc., Respondent)))	Eric Fournie, Counsel

INTRODUCTION

[1] This is an Application filed under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”), alleging discrimination with respect to employment because of sex, and reprisal.

[2] The applicant is a sales professional. The respondent is a growing company that designs customized computer applications for its customers. From September 8, 2009, to March 19, 2012, the applicant worked for the respondent as a Director, Business Development, which means she was a sales executive.

[3] On January 20, 2012, the respondent sponsored a customer appreciation day that was for men only. The respondent paid for some male employees and clients to attend Mansfield Ski Club’s “Men’s Day 2012”. The ski club’s brochure advertised the event as “A day for Men without Women and Children”, using the tag line “Bring your friends, bring your acquaintances, just don’t bring your wife!” The respondent’s electronic calendar invitation to Men’s Day listed planned activities including: “massage” and “Hooters Girls”.

[4] Because the applicant is a woman she was not invited to Men’s Day. She complained about it to both her immediate supervisor and the respondent corporation’s owner and president. Neither of them agreed with the applicant’s view that a gender-exclusive event like Men’s Day was inappropriate.

[5] The Application alleges that the applicant’s exclusion from Men’s Day was discrimination on the basis of sex contrary to s. 5(1) of the *Code*. It also alleges that after the applicant complained about Men’s Day, a series of events occurred that constitute reprisal and a breach of section 8 of the *Code*. Those events include termination of the applicant’s employment.

[6] The respondent takes the position that although the applicant was excluded from participating in Men’s Day because of her sex, that differential treatment does not

constitute discrimination under the *Code* because it had no real impact on her. The respondent also argues that the termination of the applicant's employment was not a reprisal; rather, it was based on the applicant's poor performance. The respondent asserts that her poor performance started in November 2010, when the applicant and her spouse separated, and by March of 2012 it was evident to the respondent that the applicant's performance was not going to improve to the level required to justify continuing her employment. Further, the respondent takes the position there was no intention to retaliate against the applicant for complaining about Men's Day; on the contrary, it addressed her concerns and thought they had been satisfactorily dealt with.

[7] Having considered the evidence and submissions of the parties I am satisfied that the applicant's exclusion from Men's Day constitutes discrimination contrary to s. 5(1) of the *Code*. I also find that the respondent's behaviour after the applicant complained about Men's Day is reprisal. The respondent is ordered to pay to the applicant compensation for losses arising out of the infringements of the *Code* of \$150, plus her salary for the period April 16, 2012, to October 8, 2012, inclusive, less statutory deductions and applicable taxes; and compensation for injury to dignity, feelings and self-respect totalling \$18,000.

[8] This Application was heard in Toronto on September 18, 19, and 20, 2013. The applicant testified and called as witnesses Terry Potter and Mike Gelesz. Both Mr. Potter and Mr. Gelesz worked for the respondent as sales executives. The respondent called as witnesses Darryl Sennick, a vice president employed by the respondent involved in the technical side of the business, and Ken Ryder, the respondent's owner and president.

PRELIMINARY ISSUE

[9] At the beginning of the hearing the applicant sought permission to introduce into evidence an unsworn affidavit from an individual who is named in the Application as a potential witness for the applicant, but not named as a witness in the applicant's productions made pursuant to Rule 17 of the Tribunal's Rules of Procedure. The affiant

was not named as a witness by the applicant in her productions under Rule 17 because he was undergoing surgery and unavailable at the time they were due. The applicant indicated a sworn version of the affidavit would be obtained if the Tribunal was prepared to accept it into evidence.

[10] The potential witness worked at all material times for a customer of the respondent's. During the course of his employment he had contact with the applicant as she was the sales professional assigned to his employer's account. He was one of the respondent's customers who was invited to and attended Men's Day and he had discussions with the applicant about it. My brief perusal of the affidavit indicated to me that its content was mostly corroborative of private conversations the affiant had with the applicant about Men's Day and his feelings about it, and not likely to be crucial evidence in support of either party's position.

[11] The draft affidavit was produced to the respondent the day before the hearing began. It was unclear at the hearing whether or not the affiant would be available for cross-examination as he was undergoing medical treatment. However, the applicant did not seek an adjournment so he could be called as a witness. The respondent objected to the affidavit being entered into evidence and provided me with *Fish v. National Steel Car Ltd.*, 2012 HRTO 1930, in support of the proposition that it should not be allowed.

[12] Pursuant to Rule 16.2 parties are required to file and deliver to each other copies of any documents they intend to rely on at least 45 days prior to the commencement of a hearing. Rule 16.4 says no party may rely on or present any document not provided in accordance with Rule 16.2 except with the permission of the Tribunal. Similarly, Rules 17.1 and 17.4 say the same about witness statements and witnesses. However, the Rules also give the Tribunal the power to waive any rule or procedure unless it is prohibited by legislation or a specific rule. There being no such prohibition with respect to Rules 16 and 17, the Tribunal has jurisdiction to accept into evidence documents not disclosed in accordance with its Rules and hear from unplanned witnesses.

[13] *Fish v. National Steel Car Ltd.*, above, does not deal with the issue of late productions or unplanned witnesses. Rather, in that instance the Tribunal was asked to accept evidence by way of affidavit one month prior to a scheduled hearing. In denying the request the Tribunal states at para. 12:

It would be only in the most exceptional circumstances that this Tribunal would allow a witness to testify by affidavit rather than being called to appear in person as a witness. I appreciate that this Tribunal has the legislative entitlement to adopt procedures that differ from traditional adversarial court proceedings, and there are circumstances where permitting the introduction of a witness' evidence-in-chief by affidavit or even by affirming the truth of the contents of a detailed witness statement is a procedural tool that is employed. I myself have done so on numerous occasions. But any witness who is put forward to provide contested evidence needs to be made available at the hearing for cross-examination by the opposing party, subject to only the most exceptional circumstances.

[14] I would agree with the general principle enunciated in *Fish v. National Steel Car Ltd.*, above, that witnesses in Tribunal proceedings need to be produced for cross-examination subject to the most exceptional of circumstances. To that I would add that producing a proposed witness or affidavit at the last moment is a practice to be strongly discouraged as it creates the possibility of unfair surprise and may result in procedural unfairness.

[15] In the circumstances of this case, particularly the lack of concrete information as to whether the affiant was available to be cross-examined or not, I was not prepared to find that there are exceptional circumstances justifying accepting the proposed affidavit into evidence or that its admittance would not unduly prejudice the respondent. Therefore, the applicant's request was denied.

CHRONOLOGY OF EVENTS

The Beginning of the Applicant's Employment with the Respondent

[16] Immediately prior to working for the respondent the applicant was employed for ten years as a client executive for a large telecommunications company. The

respondent found her profile on-line and contacted her about an employment opportunity with the respondent. After a series of interviews the respondent hired the applicant as an account executive. Her title was Director, Business Development, and she started working for the respondent on September 8, 2009.

[17] The parties entered into evidence the applicant's written employment contract. The contract identifies the applicant's key responsibilities as follows:

- To support the generation of profitable revenue
- To support the generation of a strong sales pipeline and backlog of business
- To develop and maintain long term customer relationships and high customer satisfaction within your account base
- To support the company's market image and message
- To support the company's best practices around Pricing, Delivery, Profit Tracking, and Collections, through project involvement from start to finish
- Maintain a good understanding of [the respondent's] service offers and the related Microsoft product suite
- Establish and maintain good working relationships with Microsoft Account Executives and Partner Account Managers

[18] The parties agree that during the course of the applicant's employment the respondent was growing rapidly, although their evidence differs slightly with respect to the total number of employees. When the applicant's employment started there were a total of about 30 to 40 employees, more than half of whom were technical staff and maybe 4 or 5 were women. She was the only female sales executive. By the time the applicant left the number of women employees was about the same but there were approximately 70 staff. The growth was overwhelmingly attributable to an increase in the number of technical employees. There also appears to be no dispute that the respondent operates within a male-dominated industry.

[19] At the beginning of a sales professional's career with the respondent a few months are spent getting familiar with the corporate environment. The sales person is provided with one or more house accounts. A house account is an already existing customer. The sales executive is said to "own" the account, which means it is their responsibility to nurture the relationship with the client customer; the aim being generation of new sales. This idea of ownership is extended into the remuneration structure; all sales to a client are credited towards calculating the sales executive's commission regardless of whether the executive played a role in generating that sale.

[20] Each sales executive is responsible for a number of accounts within a vertical. Essentially a vertical is a clustering of accounts characterised by the business the client is engaged in. The applicant's vertical was a combination of financial accounts and retail. Terry Potter's vertical was government and the health sector. Mike Gelesz's vertical was a combination of financial and mining. The growth experienced by the respondent during the period of the applicant's employment seems to be primarily the result of growth in the mining sector.

[21] At the beginning of her employment the applicant earned a base salary of \$80,000, and was guaranteed a minimum commission of \$28,000. She was also entitled to a car allowance and benefits. According to her contract, commission was payable to her on revenue generated in her vertical over \$800,000. As of January, 2011, the car allowance was rolled into salary and her base salary increased to \$86,000.

[22] The applicant's contract is somewhat confusing in that it says:

You will receive a total compensation target of \$158,000 per calendar year based on the following formula...

The reason this is confusing is that applying the formula that follows results in the conclusion that the only way the applicant could earn \$158,000 is if she achieves sales of \$1.92 million. However, her contract does not set a sales target and her first written performance evaluation indicates her sales target in 2010 was \$1.2 million. Neither

party offered any evidence or explanation with respect to this discrepancy between the formula in the applicant's contract and her actual sales target so I place no weight on it.

2010 and 2011 Events

[23] During the first year of her employment with the respondent the applicant learned and grew in her role and her performance was considered to be satisfactory. She received some feedback that indicated to the applicant that her performance was more than satisfactory. For example, at the 2010 office Christmas party she and another employee on the technology side were singled out for congratulations on a job well done with respect to one particular house account the applicant had been given in March of 2010. The applicant states that when she was given the account the relationship between the client and the respondent was rocky; for example, the technology staff felt that working on that client's projects was akin to punishment and would threaten to leave if not relieved from working with them, and there was discussion internal to the respondent about firing the client. Both of the respondent's witnesses agree that the applicant performed well in 2010 with respect to this particular client.

[24] In addition, in 2010 the applicant exceeded her sales target by posting sales of \$1.8 million. Her performance evaluation for 2010 resulted in a score that was midway between "meets expectations" and "exceeds expectations".

[25] That being said, the evidence establishes that in late 2010 concerns arose about the applicant's performance. This is relevant because although the applicant alleges that the termination of her employment on March 19, 2012, was an act of reprisal and a breach of the *Code*, the respondent argues that her termination had nothing to do with her complaints about Men's Day but was a result of performance problems which began in November of 2010 when the applicant and her spouse separated. The evidence with respect to the applicant's performance appraisal for 2010 and the respondent's performance concerns is discussed in detail below under the heading "Analysis".

[26] The applicant's sales in 2011 were less than in 2010. Both parties attribute this decline to events in the applicant's personal life. After the separation in November 2010, the applicant and her spouse divorced. That occurred mid-2011.

[27] Ken Ryder met with the applicant and the other sales professionals weekly as a group as well as individually. He was well aware of the applicant's personal situation and describes her during this period as distracted, detached, and not as engaged or motivated. There is no dispute that Mr. Ryder was very supportive of the applicant during the period of her separation leading up to her divorce. He told her that the respondent was behind her, would support her and give her the time she needed to recover. He also repeated this to other employees when questions or complaints were raised about the applicant's performance. This is confirmed by Mike Gelesz. He participated in management discussions where the applicant's performance was discussed. The upshot of those discussions was that the respondent wanted to give the applicant time to recover, giving her that time was a priority, and her job would be there. Mr. Gelesz says this continued to be a theme in management discussions until about July, 2011.

[28] In the summer of 2011 the applicant told Ken Ryder she was feeling back to her normal self and ready to re-focus on her work: "I'm back". The applicant takes the position that her sales performance improved to the extent that at the time of termination of her employment, her sales numbers were so high that it is more likely than not that her termination was a reprisal for her complaints about Men's Day. The respondent takes the position that her sales numbers did not indicate her overall performance had improved. Both parties led considerable technical evidence with respect to the sales data in support of their positions and that evidence is also discussed below under "Analysis".

[29] Also in the summer of 2011, the respondent was implementing some organisational changes that were necessary in part because of the respondent's rapid growth. In August or September, 2011, there was discussion within management about organizational changes and a document was distributed to the inner circle. It was

entered into evidence before me. It is a graphic which identifies areas where changes were anticipated. In the sales area, it indicates that an administrator was going to be removed and a new vice president of sales hired. This new vice president of sales was Peter Jeffs, who was hired in September of 2011. The graphic also highlights the names of Terry Potter and the applicant and indicates the plan at that time was to review their positions with an eye to improving results. Mr. Gelesz says that the discussion around this highlighting was that there was no intention to reorganize or replace those individuals; rather there was to be a review and the supports for those people would change so they had the opportunity to improve performance. The respondent agrees that in August and September of 2011, there were no plans to terminate the applicant's employment, but there were concerns about her sales numbers and performance.

[30] In August of 2011, the applicant was asked by an individual she knew at Microsoft what her career plans were and she expressed an interest in working there. The applicant had worked for a large firm prior to joining the respondent and she had an interest in one day returning to the big firm environment. So she provided a personal information form and a résumé to the person who approached her and had at least one meeting to discuss the possibilities there. The applicant states that at the time she was not seriously considering a move as she did not feel she was at the top of her game and there was traction happening in her accounts and her performance.

[31] Also in this period Mr. Ryder announced that he was stepping back from part of the role he had been filling. For all intents and purposes he was functioning as head of the sales department, so he decided to hire a new vice president of sales to enable him to focus on being the president. According to Mr. Ryder, during interviews and meetings leading up to Mr. Jeffs commencing employment with the respondent as the new vice president of sales, he told Mr. Jeffs about performance challenges in the sales department and asked Mr. Jeffs if he wanted Mr. Ryder to do a round of terminations prior to Mr. Jeffs' arrival. Although not explicitly stated by Mr. Ryder in his testimony, based on the re-organization graphic, I believe this statement was made in reference to both the applicant and Mr. Potter. Mr. Jeffs indicated he preferred to work with people

first before making changes. As a result, by the time Mr. Jeffs started actively working with the applicant in October of 2011, the respondent's intention was to continue to work with the applicant to help her improve her sales.

[32] It is the respondent's normal practice for sales executives to meet every week in a group and one-on-one with their supervisor. In October, the sales executives' normal one-on-one meetings with Ken Ryder stopped. Instead the weekly sales meetings and one-on-ones continued with Peter Jeffs, although Mr. Ryder occasionally attended the group sales staff meetings.

[33] In the fall of 2011 the applicant says she had a discussion with Peter Jeffs in which he expressed his intention of hiring a least four more sales people and expanding the number of verticals to at least seven. The applicant's new focus was to be on retail and she developed a retail account plan for 2012.

Men's Day

[34] One of the initiatives that Peter Jeffs launched shortly after his arrival was a series of customer appreciation events involving skiing. Mr. Jeffs was a member of the Mansfield Ski Club in Mansfield, Ontario. Every year the club offers a number of themed ski days for its members and their invited guests. Two events were identified as activities that the respondent would offer to clients as customer appreciation events: Men's Day on January 20, 2012, and Corporate Day on March 2, 2012.

[35] Sometime in November or December, 2011, Peter Jeffs started sending out electronic invitations to Men's Day. Attached to the invitation was information in a brochure about Men's Day provided by the Mansfield Ski Club. This brochure described Men's Day as: "A day for Men without Women and Children"; and used the tag line "Bring your friends, bring your acquaintances, just don't bring your wife!" The advertised price was \$150 per person which covered: breakfast, lunch and an après ski snack; complimentary beverages; ski lessons and rentals; and ski wear to take home. The brochure also indicates massage is available but it is not clear if it is included in the

ticket price. In addition to the attached brochure, the electronic invitation includes text presumably written by Peter Jeffs. This text contains a bulleted list of events and services included in Men's Day. "Massage" appears as one of the bulleted items on that list, as does "Hooters Girls".

[36] This reference to Hooters Girls was either a mistake by Peter Jeffs or there was a change in the ski club's plans prior to January 20, 2012. No Hooters Girls attended in 2012, although they had attended in the past for the purpose of selling raffle tickets for charity. In 2012, a raffle was held as part of Men's Day and the proceeds were used to fund disabled children's ski programs.

[37] The electronic invitation was sent out to certain male clients and certain male employees. No evidence was led that would indicate any female employees or clients received the invitation as a courtesy copy. Both Terry Potter and Mike Gelesz received the invitation; the applicant did not. There is no dispute between the parties that the applicant was not sent an invitation because she is female.

[38] Both Mr. Potter and Mr. Gelesz had concerns about the information contained in the invitation and spoke separately to Mr. Jeffs about their concerns.

[39] Terry Potter met with Mr. Jeffs about Men's Day sometime in December, 2011. Mr. Jeffs asked him which of his clients Mr. Potter wanted to invite. Mr. Potter states he told Mr. Jeffs that he would not invite any of his clients to such an event and he thought such things went out with the Hula Hoop. His vertical was in government and health care where over half of the executives are women. He states that he asked Mr. Jeffs about the applicant attending, given she is female, and Mr. Jeffs told him she could not attend, to which Mr. Potter expressed his disapproval. It is his view that a client invited to Men's Day whose sales executive is excluded because of gender will wonder about her absence and it would harm the respondent's image and the business development activity that occurs between sales executive and client. In other words, it was bad for business. Mr. Potter states that Mr. Jeffs was clearly not pleased by his criticism of Men's Day and defended it as an event that had been ongoing at the Mansfield Ski Club

for a number of years. Mr. Potter did not complain about it further and never spoke to Mr. Ryder about it.

[40] Terry Potter quit his job with the respondent in June of 2012. He did so primarily because he was frustrated with the amount of technical support available to support his vertical; but he was also unhappy with the organisational changes and he states Men's Day tainted his view of the respondent.

[41] Mike Gelesz quit his job in December of 2011, but discussed Men's Day with Peter Jeffs before his departure. After Mr. Gelesz received the electronic invitation he approached Mr. Jeffs to ask about its purpose because the respondent had never done anything like it in the past. Mr. Jeffs told him the purpose was to get some guys together and build relationships. Mr. Gelesz says he asked Peter Jeffs a hypothetical: if he wanted to invite clients to strip clubs to build business relationships, would the respondent support that kind of activity? Mr. Jeffs replied absolutely, that is how we are going to do it moving forward and confirmed the respondent would fund such activities. Mr. Gelesz also did not discuss his concerns with Mr. Ryder.

[42] Mr. Gelesz states that it is also his view the applicant's inability to attend with her clients an event like Men's Day negatively impacts on the working relationship.

[43] Also in December, 2011, the applicant and Mike Gelesz had a discussion about Men's Day. They both recall discussing the exclusion of women from the event. However, Mr. Gelesz states they also discussed the details like massage and Hooters Girls while the applicant has no recollection of that. She recalls asking Mr. Gelesz for a copy of the electronic invitation so she could investigate it further but he had not kept it.

[44] The applicant states she started looking for another position in December or early January as she learned about Men's Day. Another contributing factor behind her job search was that the respondent's culture was changing and it was becoming a different work environment. This evidence of the applicant about the changing culture is supported by that of Terry Potter and Mike Gelesz.

[45] During the course of the hearing I asked both Terry Potter and Mike Gelesz about their reasons for leaving the respondent's employment. In replying to my questions they both stated that at the time they resigned they did not have a new job lined up but were confident in their ability to obtain a new position. Mr. Gelesz also observes that in his career the average tenure he experienced as a sales professional in any given role was three to five years. It is also his evidence that his employment with the respondent lasted about three years and after he left the applicant was the most senior sales executive. Both Mr. Potter and Mr. Gelesz listed the changing environment at the respondent as a factor in their decision to leave.

[46] The applicant's evidence about starting to seriously look for another position around this time is supported by documentary evidence provided by the respondent. The respondent filed into evidence a number of e-mails dated January 10, 11 and 12, 2012, in which the applicant and her friends or contacts distribute her résumé. There is also an e-mail string dated March 8, 2012, in which the applicant is informed of a job opportunity by a friend; she responds by telling him she has already applied, and asks him if he is willing to internally refer her.

[47] According to the applicant, she first learned about the additional details concerning Men's Day on January 18, 2012. That day she met with a particular male client and asked him if he was planning to attend the customer appreciation day. He replied by saying he was only going for the skiing and not the Hooters Girls or massage. The applicant states her initial reaction to this was to laugh as she thought he was joking. When she realised he was not she apologised and asked him if he could share with her his copy of the electronic invitation. He told her he had deleted the references to massage and Hooters Girls, changed the subject line, and made his electronic calendar for that day private because he did not feel it was an appropriate use of work time and he was concerned how his female colleagues would react if they saw it. He forwarded to her the invitation with the deletions. There are e-mails in the respondent's documents indicating that on January 18, 2012, the applicant asked Terry Potter if he had a copy of the original electronic invitation.

[48] The applicant states that the next day Peter Jeffs unlocked his electronic calendar and she could access for the first time the written details about massage and Hooters Girls. She also states it is respondent policy for appointment calendars to be available for viewing by others but Peter Jeffs had a tendency to turn on privacy functions.

[49] The Response disputes the applicant's statements concerning when and how she found out about Men's Day; it states she was aware of Men's Day by October of 2011 because she attended customer lunches and sales meetings where it was discussed. The applicant does not dispute that she was in attendance during at least one lunch where Men's Day was discussed. However, the applicant states that when Men's Day was mentioned in her presence during this period it was described as a customer appreciation event involving skiing; the gender exclusive nature of the first of the two scheduled events was not mentioned. The respondent led no evidence to rebut this statement of the applicant's so I accept her evidence that at sales meetings and customer lunches she was told about customer appreciation events involving skiing but it was not made clear to her that she would not be invited to attend the first one because of her gender. For the same reason I accept the applicant's evidence that she was unaware of the Hooters Girls and Massage items listed on the initial electronic invitation until January 18, 2012. It is unclear when the applicant learned that the first customer appreciation event was exclusively for men but at the latest it was sometime in December, 2011.

[50] Ken Ryder states that he knew Men's Day was only for men from the beginning of his discussions with Peter Jeffs about the customer appreciation events, but he was unaware of the details about massage and Hooters Girls until late December, 2011, or early January, 2012. When he saw those bullet points in the electronic invitation he investigated further by talking with Peter Jeffs about it. He learned that Hooters Girls had attended Men's Day in the past but only to sell raffle tickets. Men's Day in 2012 was to include some fundraising activity in support of ski programs for disabled children. The massage services were offered by professionals and also served a fundraising purpose.

Mr. Ryder states that after speaking with Mr. Jeffs it was decided to remove the bullet point about Hooters Girls from further iterations of the electronic invitation and stick to the agenda as stated in the brochure from the Mansfield Ski Club.

The Applicant's Complaints about Men's Day

[51] On the Monday following Men's Day the applicant spoke to Peter Jeffs about it after they completed their normal sales review. As Peter Jeffs did not testify and the respondent offered no evidence that would contradict her version of what occurred between them that day, I accept her testimony in this regard in its entirety.

[52] The applicant states she was still a little bit shocked at that time and unsure what to do about it but felt she had to do something; she could not just let it go. She could not work in the respondent's company without making it known she was against the event. She says Peter Jeffs became agitated and appeared irritated. He defended the event by saying it was very common and had been done in other companies he had been involved with in the past. She also says he confronted her about her timing in raising the issue as she had prior knowledge of the event. She says she responded: "Are you saying you told me about a Men's Day event that included Hooters Girls and massage services and I didn't say anything?" Given the context of her testimony I take this to mean the applicant expressed incredulity at the idea she would ever stay silent in the face of being informed of Men's Day. The applicant further states Mr. Jeffs raised his voice and told her that if she had a problem it was her problem. That was the end of her meeting with Mr. Jeffs.

[53] On the same day that the applicant had this conversation with Mr. Jeffs the respondent's controller printed off a document marked confidential. It was entered into evidence before me and shows the applicant's monthly sales for the calendar year 2011 and her commission earnings. Ken Ryder describes this print-out as a performance-based request. On examination-in-chief Ken Ryder was asked why the respondent would be looking at this document. He states it was because the respondent was

considering winding down the applicant's employment. It was looking at evidence concerning whether the relationship should continue.

[54] On cross-examination Mr. Ryder clarified that he was not the one who printed out the commission statement; that was done by the respondent's controller who is the only one with password authority to do so. He also states that at the time the document was printed he was unaware of the applicant's complaint about Men's Day. It is unclear from the evidence who asked the controller to print this report, or whether it was printed before or after the applicant spoke with Peter Jeffs about Men's Day. The person who Mr. Ryder says printed it was not called as a witness and is no longer employed by the respondent. Given the lack of evidence as to what time this report was printed or at whose request, I place no weight on the fact that it was printed on the same day that the applicant complained about Men's Day to the respondent.

[55] After her meeting with Peter Jeffs on January 23, 2012, the applicant says she was not happy with how he reacted and felt the issue was going to continue to be a problem between them. She states that she wanted Ken Ryder to weigh in on it because he was the president and the respondent's handbook says if you have a problem take it up with your manager and escalate the issue to the president if not satisfied.

[56] This is a reference to the respondent's "Employee Handbook" dated January 2008 entered into evidence before me. Ken Ryder states there was an earlier version put in place in 2003 but the respondent was growing rapidly so he wanted to create an exoskeleton that would suffice for that point in time and also allow the respondent to grow without having to add to it as growth occurred. He retained an expert and they assisted with its drafting, but he was responsible for spearheading its introduction and creation.

[57] The Employee Handbook is quite extensive and contains both a harassment policy and a non-discrimination policy. The non-discrimination policy says in part:

[The respondent] will not itself discriminate, and will not permit discrimination by our employees, against any employee or job applicant on the grounds of ... sex...

“Discrimination” means any action or inaction that differentiates between employees, imposes a disadvantage or withholds an advantage on the basis of a protected ground. This policy applies to hiring, training, placement, promotion, termination, layoff, recall, transfer, leaves of absence, and compensation.

In addition to avoiding discrimination, [the respondent] will not, and our employees should not, condone behaviour in the workplace that is likely to undermine work relationships or productivity. Managers and co-workers are expected to recognise and refrain from actions that offend, embarrass or humiliate others, whether deliberate or not.

Our management team has a responsibility to respond immediately to stop any activity in the workplace that undermines this policy, whether or not there has been a complaint...

[58] The harassment policy is more detailed and sets out a process for complaint handling. It specifically says that the respondent’s policy extends to activities that take place on its client’s premises and at sanctioned social events. One of the behaviours that constitutes harassment under the policy is “differential treatment of employees or co-workers based on race, gender, ethnicity, etc.” It instructs employees to clearly object to the person whose behaviour is offensive and ask them to stop and report the behaviour to their manager; if the employee feels the manager is not responding appropriately they may escalate the complaint to the respondent’s president. The policy states the respondent’s president will be responsible for initiating an investigation which will include interviews, and may include consultations with outside investigators or counsel. It also states:

Retaliation in any form against any person involved in a complaint, or in an investigation of a complaint, is in itself a violation of this policy and will result in disciplinary action.

[59] Pursuant to this policy the applicant escalated her complaint to Ken Ryder by writing him an e-mail in the evening of the same day as her meeting with Peter Jeffs, January 23, 2012. It says:

Ken,

I wanted to make you aware of a discussion that Peter and I had today regarding the Customer Appreciation Event that took place last Friday... I shared with Peter that I was surprised and quite frankly, embarrassed when my client/partners informed me of the details of the event, specifically that it was a “Men’s Day” with Hooters Girls and Massage Services. I was never made aware of these details, nor was I ever asked if I was ok with having my clients invited. Peter seemed to believe that he had shared this with me earlier, and was dismissive of my concerns or the perception that this kind of event could have on our company. I am totally supportive of a customer/client appreciation event, but not one that involves inappropriate activities or one that excludes employees and partners or clients on the basis of gender alone.

As an employee, I have to say that I’m disheartened that we would support and pay for an event like this, and I shared that with Peter. His response to me was less than ideal, stating that if /anyone has a problem with it, it is my/their problem, and that this kind of thing goes on all the time at other companies. While that might be his experience, it certainly isn’t mine. I am aware that my colleagues were consulted and invited to this event based on their gender, and that to me is not only an insensitive and archaic practice, but also directly in conflict with the tenets and values that are outlined in our company handbook – this kind of exclusionary practice does nothing to demonstrate that [the respondent] values diversity or an inclusive work environment.

My ask of you is to step back and re-evaluate this situation and any future events like this that might be proposed going forward. I am happy to discuss this further with you – and after my exchange with Peter on this today, I am hoping your intervention will help prevent future problems and escalations from myself or other employees or partners/clients.

[60] In response to this e-mail, Ken Ryder met with the applicant on January 25, 2012, to discuss her concerns. Mr. Ryder states that he was surprised by the applicant’s e-mail as the applicant had not expressed concern prior to the event being held. He says that the applicant was articulate, calm and collected during this meeting and they discussed all of the points raised in her e-mail.

[61] The applicant says that during this meeting Mr. Ryder defended the event by saying Hooters Girls were not there and even if they had been it would just be for fundraising. She says she felt he was trying to justify the event and that he was irritated by her bringing it up as an issue. Mr. Ryder does not refute the applicant's testimony concerning his behaviour during this meeting; rather, he states his recollection of events is very similar to that of the applicant's.

[62] After this meeting between the applicant and Ken Ryder it is not entirely clear from the evidence what Mr. Ryder did, if anything, to investigate the complaint as required by the respondent's policy. For example, no evidence was led to indicate that he spoke about the applicant's concerns to Peter Jeffs. I specifically asked him during the hearing if Peter Jeffs had reported to him the criticisms of Men's Day received from Terry Potter and Mike Gelesz; he stated the only thing he recalls is being told prior to Men's Day that Terry Potter would not be participating.

[63] A few hours after his meeting with the applicant, Mr. Ryder responded to her complaint in writing. His e-mail states:

... to follow up our conversation of today, here is my recap and action item(s).

If there are ever any events or actions undertaken or sponsored by a company employee, which are inappropriate or make anyone uncomfortable, it is important that they be brought to my attention, and I appreciate you bringing forward your concerns.

Your assumption of the activities was incorrect (misunderstood) and there were no "inappropriate activities". The author of the email invitation had a long list of activities where one item was titled Massage and a separate item was titled Hooters Girls. The Massage was offered as physiotherapy only, done by a professional practitioner to raise money for the theme of the event (Disabled Ski Programs). The "girls" did not attend, but they have in the past, to assist with selling raffle tickets to raise funds for this same cause.

The Men's Day event itself has a long running history of raising funds to support the Mansfield Ski Club's programs to assist disabled people who wish to explore skiing. The Club is a recognized family-centric public facility. They host and run the event, and we purchased tickets for clients

who were interested in attending as a guest. I was at the event and can vouch for the quality and appropriateness of the event and facility for clients.

As to your awareness of the event, I can only say that I was in a meeting where you were present and the event was mentioned.

In regard to gender-specific exclusionary events, this is not our normal practice, however, as mentioned, I am supportive of the grouping of clients at events where they are comfortable. This would equally include a Ladies type of event that would be equally professional, and of interest to a quorum of female clients.

As to the handling of communications, I will ensure that our management understand that discussions on, and planning of, client events should be transparent, collaborative and inclusive; and be constructed in a manner that will avoid any possibility of misunderstanding or appearance of being exclusionary in an inappropriate manner.

Thank you again, and please let me know if you feel I need to do more on this topic.

[64] To clarify, I asked Ken Ryder at the hearing if this e-mail means that the respondent will not consider holding a male-only event like Men's Day in the future; he replied that the respondent would consider it if it was comfortable and transparent.

[65] The applicant wrote back to Ken Ryder the next day. Her e-mail thanks Mr. Ryder for his follow-up and attention to the issue; she underscores that she raised the issue primarily because when her client started talking about it she felt unable to respond knowledgeably, and she agrees with Mr. Ryder that communication about events needs to be better. But she also states that she continues to disagree with the approach of holding male-only or female-only events and "I think we'll just agree to disagree on that point." Her e-mail also says:

... regardless of whether or not the Hooters girls were there or not, and regardless of the Massage therapies being offered, that was what was in the invitation that went out to clients and partners and in my opinion, detracts from the very nature of what you were trying to do.

After that e-mail the applicant never discussed Men's Day with Peter Jeffs or Ken Ryder again until the respondent terminated her employment in a meeting held on March 19, 2012.

The 2011 Performance Evaluation Process

[66] On January 31, 2012, Ken Ryder sent to the applicant the annual performance evaluation forms just as he had in January 2011, even though he was no longer her direct supervisor. His e-mail asks her to fill in her comments and then says:

The following step would be to do a review of your submission, and then lastly meet a second time to review our joint comments, with Peter included, so the hand-off can happen for 2012 goal setting.

[67] The applicant states that early 2012 was a busy time for her and filling out the performance evaluation form was not high on her list of priorities. As a result, she did not get around to it before her employment was terminated on March 19, 2012. No one sent her a follow-up asking that she return the forms and she never indicated to either Mr. Jeffs or Mr. Ryder that she was unwilling or unable to return the forms in a timely manner. No evidence was led by either party that a meeting was scheduled to discuss the results.

[68] Mr. Ryder states that he sent Terry Potter his draft evaluation form the same day he sent the applicant hers. Terry Potter testified that he does not recall getting the forms but he does recall that no performance evaluation was completed for him in 2012; sometime in March, 2012, he indicated to Ken Ryder he was thinking of leaving but he did not leave the respondent's employment until June of 2012. The respondent did not rebut Terry Potter's evidence in this regard so I accept that the respondent failed to do a performance evaluation for him for the calendar year 2011.

The Factual Allegations of Reprisal

[69] The applicant states that immediately after she complained about Men's Day Peter Jeffs stopped meeting privately with her. Up to that point in time it was the

respondent's practice for sales executives to meet with their manager one-on-one on a weekly basis. Although this practice seems to have continued for the other sales executives, for the applicant it stopped. She never met with Peter Jeffs privately again. The respondent filed into evidence an e-mail from January, 2012, in which Mr. Jeffs is attempting to arrange a meeting. The respondent suggested this e-mail establishes that Mr. Jeffs was not refusing to meet with the applicant; the applicant says the e-mail is not about a one-on-one meeting between the applicant and Mr. Jeffs. As her evidence in this regard is not disputed I accept that it was Mr. Jeffs, and not the applicant, who was responsible for the cessation of their one-on-one meetings. Mr. Ryder states that he has no knowledge of Mr. Jeffs ceasing to meet with the applicant one-on-one but agrees that if it occurred it is an indication that Peter Jeffs no longer wanted to work with the applicant.

[70] Both the applicant and Mr. Potter state that after the applicant complained about Men's Day the applicant was not invited to a meeting with a particular customer by Mr. Jeffs, even though it was a hardware store and would presumably have been in her vertical. Both Mr. Potter and another employee asked the applicant why she was not in attendance at the meeting, a question she could not answer.

[71] The applicant also states that Peter Jeffs did not invite her to attend a Microsoft event which was a networking activity similar to other such events she had attended in the past. The applicant points out that networking with Microsoft was a specific job duty set out in her contract. Instead the respondent sent new hires, one of whom had not yet started their employment with the respondent.

[72] According to the applicant, in group sales meetings after January 23, 2012, Peter Jeffs was visibly uncomfortable with her, which he demonstrated by ignoring her and refusing to look her in the eye. She says the controller reported to her that Mr. Jeffs had told him that by complaining to Mr. Ryder she had "crossed a line". The applicant states she concluded she was the subject of a rumour mill and generally perceived as having done something wrong. None of the other witnesses testified this was the case, although only Darryl Sennick was actually asked about it.

[73] The applicant further says that after she complained about Men's Day she and Mr. Ryder did not have another regular exchange as they had in the past and when they did speak, it seemed strained and tense. Mr. Ryder neither confirmed nor denied this statement of the applicant's.

[74] The respondent's witnesses did not provide testimony with respect to how the applicant was treated after she complained about Men's Day up to her termination from employment. Mr. Ryder only recalls receiving thanks from clients, and hearing from employees who had action items to follow up on in terms of further relationship building. As a result, and given the partial corroboration offered by Mr. Potter, I accept the applicant's evidence that after she complained about Men's Day, she was excluded from regular one-on-one meetings with her immediate supervisor and at least one client meeting and Microsoft event; and communication with Mr. Jeffs and Mr. Ryder became awkward and tense.

[75] According to Mr. Ryder, sometime in early March, 2012, he made the decision to terminate the applicant's employment for performance reasons after consulting with Peter Jeffs, Darryl Sennick, and the controller. Mr. Sennick denies being involved in the decision-making process with respect to termination of the applicant's employment except to the extent that he provided his negative observations about the applicant's performance to Mr. Ryder prior to March, 2012.

[76] The applicant states that she was told to attend a meeting about a client scheduled for March 19, 2012. Mr. Ryder and the respondent's controller were present at the meeting. She was told the respondent was invoking the terms of her contract on a without prejudice basis and Mr. Ryder read to her a letter terminating her employment. The applicant asked if the termination had anything to do with Men's Day but the respondent followed its normal protocol and refused to comment on the reasons for her dismissal. The termination of the applicant's employment was effective immediately but her salary and benefits continued for four weeks and the termination letter states: "[the respondent] will also waive the repayment of the negative balance of your outstanding draw account against unearned commission in the amount of \$8,261."

[77] The applicant states that she was completely surprised by her termination even though the atmosphere at the respondent had deteriorated to the point where she was unsure how things could keep going. She says that she felt upset and worried but that the biggest impact was to her self-esteem. The termination of her employment undercut her faith in herself and made her question her abilities.

[78] After the applicant's employment was terminated her job search naturally intensified. In the period April 1, 2012, to September 30, 2012, the applicant attended at least 23 job interviews. However, she received no offers of employment until September 28, 2012; she accepted that offer and her new position commenced October 9, 2012. The base salary for her new position is \$82,000; it does not pay her a draw against commissions regardless of sales as the respondent did, and her vacation entitlement is five days less per year than it was with the respondent.

ANALYSIS

[79] This Application raises two questions: namely, was the applicant's exclusion from Men's Day discrimination on the basis of sex contrary to s. 5(1) of the *Code*, and were the events that occurred after she complained about it up to and including the termination of her employment, a reprisal in contravention of s. 8?

The Analysis with respect to Men's Day

[80] Section 5(1) of the *Code* says:

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

[81] The key wording in this provision is "a right to equal treatment... without discrimination". What this wording implies is that not all instances of differential treatment are discriminatory.

[82] In this Application the respondent acknowledges the applicant was treated differently because of her sex: she was not invited to Men's Day and her male peers were. Rather the respondent takes the position that the unequal treatment was not discriminatory. It relies on the Supreme Court of Canada's decision in *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 37, for the proposition that discrimination necessarily involves adverse or negative impact. The respondent asserts that its behaviour in not inviting the applicant to Men's Day or allowing her to attend is not discrimination because it had no negative or adverse impact on her. The applicant does not dispute the assertion that discrimination necessarily involves some form of negative impact, but rather takes the position that the evidence establishes that being excluded from Men's Day did have a negative or adverse impact on her.

[83] Paragraph 37 of *Law Society British Columbia v. Andrews*, above, contains the following definition of discrimination:

... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[84] The respondent also provided me with the Ontario Court of Appeal's decision in *Peel Law Association v. Pieters*, 2013 ONCA 396. That decision cites with approval at paras. 55 and 56 the definitions of discrimination found in *Moore v. British Columbia (Education)*, 2012 SCC 61, and the Ontario Court of Appeal's decision in *Shaw v. Phipps*, 2012 ONCA 155, as follows:

The traditional definition was applied in *Moore*, where Abella J. said at para. 33:

As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, applicants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden

shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

Lang J.A., in this court's decision in *Shaw*, at para. 14, said the following three elements were required to establish a *prima facie* case:

1. That he or she is a member of a group protected by the Code;
2. That he or she was subjected to adverse treatment; and
3. That his or her gender, race, colour or ancestry was a factor in the alleged adverse treatment.

[85] Therefore, there is no real dispute that the law with respect to discrimination is that an applicant must establish that the treatment in question has some form of adverse impact on her.

[86] In support of the proposition that the respondent's behaviour had no adverse or negative impact on the applicant, the respondent points to the evidence concerning the respondent's compensation structure; the text of the applicant's e-mail correspondence with Mr. Ryder about Men's Day; and the history of support the applicant received in her employment from Ken Ryder. Having considered this evidence, the case law referred to by the parties, and the parties' submissions, I am satisfied that the applicant did experience an adverse impact because of her sex with respect to Men's Day. I am further satisfied that the respondent breached s. 5(1) of the *Code*.

[87] With respect to the respondent's compensation structure, the respondent correctly states that the evidence establishes that only one of the applicant's clients attended Men's Day and if additional sales resulted from that exercise in relationship building, the applicant would have received commission credit for it. From a strictly financial point of view, however, the evidence also establishes that attending Men's Day brought with it benefits that had a monetary value. Attendees received free food and recreation services and were given ski clothing to take home with them free of charge. I believe it is safe to assume that the value of these benefits is relatively modest and tied

to the ticket price of \$150, but their existence means that it cannot be said the applicant enjoyed the same opportunity to appreciate those financial benefits as did her male peers.

[88] The respondent also argues that the content of the e-mails between the applicant and Mr. Ryder concerning Men's Day shows that the applicant's language was measured and respectful. I took this to mean in part that it asserts the e-mails demonstrate she was not upset because the respondent disputes the applicant's claim that she suffered a loss of dignity or self-respect as a result of Men's Day. However, the respondent does acknowledge that the applicant's initial e-mail to Ken Ryder about Men's Day uses words like: "surprised and quite frankly, embarrassed"; "disheartened"; "insensitive and archaic". I would also observe that after referring to Peter Jeffs' reaction to her complaint, her e-mail explicitly states: "I am hoping your intervention will help prevent future problems and escalations". As a result, although the tone of her e-mails may be respectful and measured, the content indicates the applicant was negatively emotionally impacted by the incident and that she was worried about how her complaint would affect her business relationships. In other words, the e-mails corroborate the applicant's evidence that she was upset over Men's Day and do not support the respondent's contention that she experienced no loss of dignity or self-respect.

[89] The respondent also points to the positive relationship that existed between the applicant and Ken Ryder and the support he gave her during her separation and divorce. What the respondent states is that this history of support means that this situation is not like the situations which s. 5(1) of the *Code* is intended to catch. It states this is not a nasty case about nasty people doing nasty things to others; rather, this Application is about reasonable people agreeing to disagree. It seems to me that what the respondent is saying is that the impact on the applicant was lesser than the impact on applicants in other cases at the Tribunal because the behaviour complained about was trivial in comparison. Assuming without finding this is true, that speaks to the issue of remedy, not breach.

[90] I would also point out that the respondent led other evidence about Ken Ryder's treatment of the applicant that indicates her gender was a difficult issue for him to deal with. On cross-examination of the applicant, the respondent invited testimony with respect to two other incidents where the applicant's gender played a role in how Mr. Ryder treated her. Mr. Ryder confirmed her evidence with respect to these incidents in his testimony in chief. Although this evidence supports the conclusion that the applicant's gender was a negative factor in how she was treated by the respondent prior to Men's Day, the Application does not include these other events and the applicant did not argue the respondent's workplace was a hostile work environment. Nonetheless, as the respondent repeatedly relied on the history of the relationship between Ken Ryder and the applicant in its submissions, the evidence is relevant to those arguments as it is part of the history between them.

[91] The first incident involved a minor verbal faux pas in a meeting which made Mr. Ryder the butt of friendly laughter at the time. When a technical employee commented his work on a project was negatively impacted by the fact that he had a newborn at home and his wife was experiencing challenges breastfeeding, Mr. Ryder said "maybe the applicant could help you with that". What he meant was maybe the applicant could help with the project; but because the applicant was the only woman in the room it provoked laughter because, looked at the wrong way, his remark could mean he was suggesting the applicant help breastfeed the newborn. Mr. Ryder states he was embarrassed by this incident. Instead of laughing at himself and shrugging it off, his response was to send an e-mail to all of the participants afterwards to emphasise he was referring to the project and not the applicant's ability to breastfeed an infant. I draw no inferences from this incident.

[92] The second incident involved the applicant's first formal sales presentation. A button on her shirt came undone while she was speaking and a portion of her bra was visible when she moved. As the applicant puts it, instead of simply pulling on his lapel to indicate she was experiencing a wardrobe malfunction, Mr. Ryder assumed the applicant was trying to use sexual allure to sell the respondent's services. After the

presentation he approached her and said he wished to speak to her about the presentation but not until he had time to formulate what he wanted to say. After a few days he told her that she has sufficient professional skills to do her job and she does not need to use sex to do it. Mr. Ryder says it is part of his responsibility to coach his employees and he would have been remiss in his obligations not to say something to the applicant. He compares this incident to a more recent one where he had to address a body odour problem with one of his employees.

[93] As the applicant states it seems unlikely that Mr. Ryder would have told a male sales person he did not need to use sex to sell if that individual had experienced a wardrobe malfunction during a sales presentation such as an undone zipper. Mr. Ryder did not disagree with the applicant's statement in that regard. I would also observe that the body odour comparison misses the point, as both genders can experience hygiene challenges, while the accusation that someone is using their sexuality to gain a business advantage is one that is based on a negative stereotype associated with women.

[94] As a result of the second incident above, there appears to be some evidence of a possible pattern of behaviour by the respondent where women are perceived and treated differently from men; in the context of the wardrobe malfunction incident, some of that differential perception is related to negative social stereotypes of women in the business world. That being said, the applicant did not argue that the respondent was a hostile work environment for women. As a result, nothing in this Decision turns on this history between the parties except with respect to the respondent's arguments concerning the relationship between the applicant and Mr. Ryder, and in that context, is merely part of the background that makes up the full picture.

[95] As stated above, the respondent relies on *Law Society British Columbia v. Andrews*, above, at para. 37. That paragraph concludes with the following:

Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the

charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[96] Since that decision was made the courts and the Tribunal have had occasion to confirm that not all differences in treatment constitute discrimination even where the differential treatment is related to a prohibited ground. But the analysis goes beyond the question of adverse impact; the next issue to be explored is whether or not the differential treatment or impact constitutes formal inequality or substantive inequality as the *Code* only addresses substantive inequality.

[97] For example, in *Maclean v. The Barking Frog*, 2013 HRTO 630, the male applicant alleged he was discriminated against on the basis of sex by the respondent bar because it was charging male patrons a higher cover charge for entrance than female ones in a practice commonly referred to as "ladies' night". The Tribunal notes that the purpose of differential pricing for ladies' nights is to attract more women into the bar, which in turn, attracts more male patrons. The Tribunal also notes that the practice is not reflective of a societal value that men are less worthy than women, or in any way demeaning towards men. As a result, although the practice reflects a formal inequality between the treatment of men and women, it does not constitute substantive discrimination under the *Code*.

[98] In *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), the question involved the equality rights provision contained in section 15 of the *Canadian Charter of Rights and Freedoms* as did *Law Society British Columbia v. Andrews*, above. The Court's analysis addresses the issue of whether or not treating people differently based on their age in the context of survivor's benefits payable under the Canada Pension Plan (the "CPP") is substantive discrimination. Under the CPP widowers and widows younger than 35 are not eligible for a survivor's pension and recipients between the ages of 35 and 45 receive a lower benefit than those over 45. The Court describes a guideline on how equality rights issues should be approached (at

paragraph 88) and with respect to the issue of what constitutes substantive discrimination, articulates the question as follows:

Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[99] In *Law v. Canada (Minister of Employment and Immigration)*, above, the court indicated that it is helpful in answering this question to look at a number of factors, including the purpose of the treatment and the context. With respect to the CPP survivor's pension, the Court found that the age distinctions did not constitute substantive discrimination. It observes that the purpose of the survivor's pension is to provide long-term financial security to people who lose their spouses at a time in their lives when recovering financially from that loss is likely to be difficult.

[100] Here, the purpose of Men's Day was to deepen the relationship between the respondent and its customers in order to increase sales. An important part of the applicant's job description was "To develop and maintain long term customer relationships and high customer satisfaction within your account base". In other words, the very purpose of holding a customer appreciation event is to support the applicant in her job. By holding a customer appreciation event that excluded the applicant because of her gender, the respondent undercut the applicant's ability to compete on the same playing field as her male peers. It did so without apparent consideration of how her male clients might perceive her exclusion or how it might damage her working relationships; and it did so in a male-dominated industry. In other words, its behaviour perpetuated the belief that supporting women sales professionals in interacting with clients is less valuable or important than supporting male sales professionals.

[101] Given all of the above, I am satisfied that the respondent's behaviour in excluding a female sales professional from an event specifically designed to deepen

relationships between clients and the respondent in order to increase sales because of her sex, is discrimination and a breach of s. 5(1) of the *Code*.

The Reprisal Allegation

[102] Section 8 of the *Code* says:

Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

[103] The Tribunal set out the elements of a successful reprisal application in *Noble v. York University*, 2010 HRTO 878 at paragraphs 33 and 34, as follows:

Thus, in a complaint or application alleging reprisal, the following elements must be established:

- a. An action taken against, or threat made to, the complainant;
- b. The alleged action or threat is related to the complainant having claimed, or attempted to enforce a right under the *Code*; and
- c. An intention on the part of the respondent to retaliate for the claim or attempt to enforce the right.

In addition, the following principles are relevant:

- a. There is no strict requirement that the complainant has filed a complaint or application under the *Code*, and
- b. There is no requirement that the Tribunal find the respondent did in fact violate the complainant's substantive rights to be free from discrimination.

[104] With respect to the first element set out in *Noble v. York University*, above, the respondent does not dispute that the termination of the applicant's employment is the kind of event that could constitute a reprisal, by which I simply mean it was an action taken by the respondent against the applicant. This is the "action" about which the parties are most concerned. However, I would note that the applicant testified to other

actions taken against her by the respondent in response to her complaints about Men's Day; namely, she was excluded from meetings, and one-on-one supervision simply ended.

[105] The second element set out in *Noble v. York University*, above, indicates the evidence must establish that the respondent's action is related to the applicant raising rights under the *Code*. The respondent submits that the applicant never indicated to the respondent that she considered Men's Day to be a breach of her rights. Although I would agree that the applicant's e-mail communication to Mr. Ryder about Men's Day does not reference the *Code* or use the word discrimination, I am satisfied it constitutes an attempt to claim or enforce her rights.

[106] In *Miller v. Prudential Lifestyles Real Estate*, 2009 HRTO 1241, the Tribunal states at para. 36:

The Tribunal has accepted that the words "claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act" do not require that an applicant has actually filed an application under the *Code* before a reprisal can be found. **Individuals may "claim" rights under the *Code* in a variety of ways, whether through a grievance under a collective agreement, through an employer's internal human rights policy or, in some cases, by simply raising an objection to alleged discriminatory or harassing conduct.** A reprisal may be found even though a human rights application was not filed at the point the alleged reprisal occurred. [Emphasis added.]

[107] In *Campe v. Borland Canada*, 2010 HRTO 1257, the Tribunal found that by orally complaining that it is the law in Ontario that women are to be paid the same as men, the applicant was claiming rights under the *Code*. In *Bertrand v. Primary Response*, 2010 HRTO 186, the Tribunal found that in the middle of a disciplinary meeting the applicant stated his belief that he was being disciplined because of his colour and/or race. The Tribunal accepted that this statement on the part of the applicant constitutes claiming rights under the *Code*.

[108] In this Application, the applicant's complaint to Ken Ryder does not explicitly refer to the *Code* or use the word discrimination but it does say:

I am aware that my colleagues were consulted and invited to this event based on their gender, and that to me is not only an insensitive and archaic practice, **but also directly in conflict with the tenets and values that are outlined in our company handbook** – this kind of exclusionary practice does nothing to demonstrate that [the respondent] values diversity or an inclusive work environment. [Emphasis added.]

[109] This reference to the tenets and values in the company handbook is a reference to the Employee Handbook's policies with respect to harassment and discrimination quoted above. Those policies do explicitly use the word discrimination and are clearly written in contemplation of the respondent's obligations under the *Code*. As a result, I am satisfied that the applicant's e-mail to Ken Ryder constitutes a claiming of rights under the *Code* by the applicant.

[110] The next question is whether or not the actions the applicant alleges are retaliatory are related to the applicant's complaints about Men's Day. As stated above, there are actually two sets of behaviours by the respondent that the applicant points to: one, the termination, and two, the exclusion from one client meeting and one networking meeting, and the cessation of one-on-one supervision with Mr. Jeffs.

[111] With respect to the failure to invite the applicant to the one client meeting with a retail client, the respondent points to the evidence that a new sales person had been hired but not assigned a vertical and he was invited to that particular meeting in the applicant's place. All of that is true, so it is possible that the applicant's exclusion from that meeting was simply due to the fact someone new had arrived and was assigned to that account. If that had been the only incident I would agree with the respondent that the applicant has not met her burden of proof in establishing the second category of behaviours is related to her complaints about Men's Day.

[112] However, it was not an isolated incident. For the reasons stated above, I accept the applicant's evidence that she was also not sent to a networking opportunity, she

never had a one-on-one supervision meeting with Peter Jeffs again (even though they were the respondent's standard weekly practice for sales professionals), she was told by the controller that Peter Jeffs had said she had crossed a line, and both Peter Jeffs and Ken Ryder were visibly uncomfortable with her after she complained about Men's Day.

[113] No alternative explanation for these events was offered by the respondent. Given the timing of these events immediately following the applicant's complaints about Men's Day, absent some other explanation, I accept that the applicant's exclusion from meetings and the cessation of one-on-one supervision were related to her complaints about Men's Day.

[114] With respect to the termination of the applicant's employment, the respondent not only asserts it was in no way related to her complaints about Men's Day but offers an alternative explanation; namely, that the respondent made a rational business decision based on the applicant's performance. The evidence and submissions with respect to the applicant's performance and why her employment was terminated is examined in detail below.

[115] For the reasons stated below I am satisfied that it is more likely than not that the decision to terminate the applicant's employment was related to her complaints about Men's Day.

Why was the applicant's employment terminated?

[116] The applicant argues that her employment was terminated as retaliation for her complaints about Men's Day. The Response filed by the respondent states the termination was not retaliatory; rather it was because of poor performance. That was also the respondent's position at the hearing before me. However, the Response also states:

The fact that [the applicant] refused to participate in the performance review process was an unequivocal confirmation that she was not suitable

for the position. Although [the respondent] was not aware that she had been looking for another position for the past 8 months, this was confirmation that [the applicant] shared the view she was not suitable for the position.

Essentially what this means is that the Response argues the applicant's behaviour with respect to the 2011 performance review and her job search activities is consistent with her being aware that her performance was inadequate.

[117] However, the evidence before the Tribunal does not support the conclusion that the applicant refused to participate in the performance review process. It also does not establish that the applicant's exploration of career options prior to Men's Day was motivated by her own recognition of unsuitability for her position.

Did the Applicant refuse to participate in the performance review process?

[118] The evidence establishes that in January of each year the respondent sends a performance evaluation to its employees. The form is filled in with some data and the employee is expected to return comments after which the parties meet for a discussion. In 2011, Mr. Ryder sent the performance evaluation form for the 2010 calendar year to the applicant at the end of January, 2011. The applicant returned the form a week or two prior to their meeting which occurred at the end of March, 2011. The form was finalised sometime in the first part of April, 2011.

[119] For the 2011 calendar year, Mr. Ryder sent out the same form to the applicant and to Terry Potter at the end of January, 2012. There is no dispute that the applicant did not return the form to Mr. Ryder prior to March 19, 2012, the date the applicant's employment was terminated. The applicant's testimony that she felt no urgency to return the form prior to that date is consistent with her experience of the timing in the previous year. In other words, why would she feel a sense of urgency to return it prior to March 19, 2012, when it appears she did not return it prior to that date in the previous year?

[120] Further, no evidence was led to indicate the applicant was ever prompted to return the form earlier than the previous year nor is there any support at all for the contention set out in the Response that she actively refused to return it.

[121] In addition, Terry Potter's evidence supports the proposition that there was no pressure to return the performance evaluation forms or urgency around a deadline. He was sent his form the same day as the applicant and his performance evaluation was still not done by the time he left in June, 2012.

[122] Based on the evidence before me I am satisfied that the applicant did not wilfully refuse to return the forms and participate in the review process. I am further satisfied that her behaviour in this regard cannot be interpreted as some sort of acknowledgement on her part that her performance was inadequate.

The applicant's job search

[123] Similarly, the evidence does not support the assertion in the Response that the applicant's job search efforts indicate the applicant knew she was not suitable for her position. Rather, the applicant's evidence is uncontested that she was approached about her interest in moving to Microsoft in August, 2011; she did not make the initial approach. That is consistent with her evidence that she was not really looking to leave the respondent at that time. That is the only evidence of job search activity by the applicant led by the parties for the period prior to December, 2011 or January, 2012. This behaviour by the applicant is not consistent with the allegation in the Response that the applicant knew she was unsuitable for her position. If that were the case then one would normally see extensive job search activity on her part.

[124] The documentary evidence does show more extensive job search activity starting on January 10, 2012, but there is nothing to suggest something happened at that point in time to make the applicant question her ability to do her job. Rather this activity corresponds to the point in time when the applicant was learning she was being excluded from participating in the respondent's customer appreciation event. This is

consistent with the applicant's evidence that Men's Day, along with the respondent's organizational changes, made her feel the respondent was moving in a direction she did not approve of or want to be party to.

[125] I am satisfied that on balance the evidence does not establish that the applicant's exploration of career options prior to Men's Day was motivated by her own recognition of unsuitability for her position.

THE EVIDENCE WITH RESPECT TO PERFORMANCE

[126] The evidence with respect to performance primarily concerns the applicant's sales numbers, the interpretation of which the parties disagree on, but there also is evidence of other performance concerns that is discussed below. The parties do agree, however, that the applicant's sales numbers in 2011 were unacceptable and below her sales target; and that by March 19, 2012, she had billed or closed business totalling about \$1.2M, which represented at least half of her sales target for 2012. The evidence indicates that the respondent was critical of the applicant's performance as early as late 2010 and that state of affairs continued, but the respondent chose to do nothing about it until after the applicant complained about Men's Day.

[127] Chronologically, the evidence with respect to performance starts with the applicant's 2010 performance review.

The 2010 Performance Review

[128] The respondent conducts annual formal written performance evaluations of its employees. As the applicant started her employment with the respondent in the latter part of 2009, her first full performance evaluation covered the 2010 calendar year. In January of 2011, Ken Ryder sent the applicant a performance evaluation template. The standard process is that the employee's supervisor populates the form with some information primarily about goals and objectives, and the employee can fill in comments about how those have or have not been met. Then there is a meeting between employee and supervisor where the results are discussed. The applicant says that in

2011 she returned the form to Ken Ryder about a week before she met with him to discuss her results. That meeting occurred at the end of March, 2011.

[129] The performance evaluation template is divided into two sections: Section A concerns objectives and achievements for the calendar year just past; Section B is the individual's development plan for the current year and into the future. Section A requires the evaluator to numerically rate the employee in four different areas: adding value to clients; adding value to the respondent; adding value to "our people"; and sales and business development. The rating scale is:

- 1 = needs improvement;
- 2 = meets expectations;
- 3 = exceeds expectations; and
- 4 = superior performance.

[130] For the calendar year 2010 the applicant received an overall rating of 2.44 which is the average of her scores in the four areas. The applicant received 2.5 for adding value to clients; 2.0 for adding value to the respondent; 2.5 for adding value to "our people"; and 2.75 for sales and business development. Section B indicates the applicant had a sales target of \$1.2M in 2010 and achieved \$1.8M; and her revenue target for 2011 was \$2.0M. In other words, in 2010, the applicant was meeting expectations. The reason why the applicant received a meets expectations rather than an exceeds expectations when her sales exceeded her target is discussed more fully below.

[131] After meeting with Ken Ryder about her 2010 performance evaluation, the applicant had some concerns about her evaluation; specifically, she was left uncertain as to how she could move from meeting expectations to exceeding them, so she asked. Mr. Ryder responded by amending the final performance evaluation to include ten recommendations on how she could do that. The recommendations included things like:

- Demonstrate mastery in explaining to clients what the respondent can do for them and how;
- Uncover and develop latent needs that the respondent can respond to;
- High quality prequalification of leads – which involves researching needs;
- Prompt follow through;
- Exceed sales target; and
- Define and build one or more niches of industry clients that can be developed as a vertical.

[132] The applicant separated from her spouse in November of 2010 after a relationship of 21 years. All of the witnesses agree that this coincided with a decline in her productivity. Mr. Ryder testified that when he completed the applicant's 2010 evaluation he was careful to limit his evaluation to the calendar year 2010. Because he was sensitive to her personal situation he expressed his criticisms in a less than forthright way in order not to "pile on" to the applicant additional stress at a difficult time. In hindsight this circumspection on the part of Mr. Ryder was probably a mistake; it left the applicant questioning the result, which is why she asked for additional feedback about how she could improve her performance. It also left her with the firm impression that her employment was secure, whereas Mr. Ryder was looking for improved performance and increased sales.

[133] In the list of recommendations that constitutes Mr. Ryder's response to the applicant's request for additional feedback, there are a number of items that appear to me to be linked to concerns about the applicant's performance that are subtly mentioned elsewhere in the performance evaluation.

[134] For example, Mr. Ryder added as a new goal that the applicant "master the ability to explain and sell" the respondent's service offerings. Both the respondent's witnesses stated that the respondent had concerns that the applicant was not as good as her peers at explaining to clients the respondent's technical capabilities and

strengths or how the respondent's computer applications could best meet the client's needs. Mike Gelesz also says that he heard criticism of the applicant's grasp of the technical aspects of the respondent's products although in his experience such criticisms are often made by technical staff about sales executives. In the development plan for the next year, this concern is mentioned again: "Become skilled in ability to articulate and present our skills and solutions". And it appears again in the added specific recommendations: "Demonstrated mastery in the ways she expresses and explains what we do and how we do it, for the benefit of our clients."

[135] Another example would be Mr. Ryder's concern that the applicant was not pursuing and bringing in new clients. The applicant states that she was not told she had to pursue new clients and there was no discussion during the performance review process that would lead her to believe developing new clients was a key to her success. However, this concern is expressed in the performance evaluation. In the section reserved for Manager Comments, Mr. Ryder writes:

[The applicant's] strengths have been shown to be ones of account farming and development, over brand new account creation... Her success is critically important to the growth of [the respondent] as we endeavour to broaden our base of clients we support, and we look forward to [the applicant] adding a few new names to her portfolio this year.

[136] Again one of the specific recommendations that Mr. Ryder added after the applicant asked for additional feedback mirrors the concern about diversification of revenue sources:

Proactively define and build one or more niches of Industry clients that can be developed as a vertical reference list, where we show repeatable expertise, and where she can develop her own leads.

[137] The parties agree that for a sales executive like the applicant the most important indicia of performance is sales. According to the applicant's 2010 performance evaluation, her revenue target for 2010 was \$1.2M and she achieved sales of \$1.8M. Logically one would expect from this result that the applicant would receive a rating of 3

or “exceeds expectations”, but she did not; rather her rating was 2.75. Both Mike Gelesz and the applicant state that the respondent does not differentiate between a dollar earned from an existing client or one from a new client. Although that is certainly true when calculating commission and counting revenue, one reasonable explanation for the applicant’s ranking of 2.75 in the face of exceeding her revenue target is that the respondent attached value to bringing in new clients beyond the dollars generated and that is consistent with Ken Ryder’s evidence. Mike Gelesz also says that in August or September, 2011, he was involved in a management-level discussion where enhancing the respondent’s ability to attract new clients was discussed. So I accept the respondent’s evidence that it was a concern of the respondent that the applicant did not appear skilled at attracting new clients.

[138] There is no dispute between the parties that it was the respondent’s expectation that the applicant’s sales numbers would grow over time and she was still growing into her role in March of 2011. Her sales target for 2011 was \$2.0M. (Ken Ryder states that the respondent’s sales executives need to reach a revenue target of \$2.4M to justify the return on investment and that would have been the applicant’s revenue target for 2012 if her employment had not been terminated.)

[139] Another example reflects complaints that Mr. Ryder was aware of, concerning how the applicant was pre-qualifying leads provided by Microsoft. Mike Gelesz states that about once a month Microsoft would provide the respondent with information about a new potential client; the respondent would follow up by researching the potential client and its needs with an aim to making a sales pitch or developing a new business relationship. Microsoft does this because the respondent is a designated preferred partner. Sometimes these leads would be given to the applicant. Mike Gelesz expressed frustration to Mr. Ryder about the quality of pre-qualification work being done and told him he preferred to do it himself. He recalls one specific incident when the applicant changed a meeting at the last minute related to pre-qualification work.

[140] The respondent’s concern about the applicant’s performance in this area is reflected in the development plan portion of the 2010 performance evaluation, which

says: “Work collaboratively with Mike on lead handling and opportunity development”. And it is reflected in one of the additional ten recommendations:

High quality prequalification of opportunities and preparing peers with detailed profiles and investigated information that is relevant.

[141] During cross-examination, the applicant resisted the characterisation of this issue as an identified weakness, saying she did not agree with the word “weakness” as she was meeting expectations and the list of recommendations was about getting beyond that. She similarly resisted questions on cross-examination when issues raised in the performance evaluation were referred to as “concerns”. This is not surprising given the oblique way the performance evaluation is written and the way Mr. Ryder admits he expressed himself.

[142] In summary, what the evidence with respect to the applicant’s 2010 performance evaluation shows is that the applicant was at the beginning of her career with the respondent and was expected to grow; given that stage of her development, her performance met expectations. However, the respondent had some concerns about her performance and expected her to modify her behaviour to address those concerns and to increase her sales to exceed her stated target. But the respondent did not communicate its concerns well to the applicant and she was left feeling more secure in her employment than she perhaps should have been.

The Sales Data

[143] The only thing the parties agree on about the sales data is that in 2012 the revenue associated with the applicant’s accounts prior to her termination was about \$1.2M; however, during his testimony, Ken Ryder initially disagreed that this was the case and then agreed when directed to the actual sales charts. This means that in the first quarter of 2012 the applicant achieved about half of her sales target for the year.

[144] However, the parties fundamentally disagree on what the data means with respect to anticipated sales for the rest of the year. They also disagree as to the

conclusions that can be reached based on the sales data from 2011. The respondent takes the position the data does not indicate the applicant was back on track or likely to reach her target by year end. The applicant takes the opposite view. In the end result, the data can be used to support both parties' positions: it is possible the applicant was doing well and would continue to do so, and it is possible the early 2012 results represented an unsustainable anomaly. The difficulty with both of their positions is that predictions with respect to future performance are speculative no matter how much historical data is taken into account or experience brought to bear or how sophisticated is one's forecasting model. From the Tribunal's perspective what the sales data does firmly establish is that the applicant's performance as at the time of her termination was on track to be better than it was in both 2010 and 2011, albeit not necessarily at the \$2.4M revenue level the respondent says was required.

[145] The parties used a number of terms when talking about the meaning of the sales data. "Billed business" refers to work where the technical staff is actively working on and supplying product to clients. The work was billed, invoices issued, and accounts were being paid. In other words the respondent was in receipt of revenue. "Closed business" is where a contract is signed but work has yet to begin and no invoices have been issued. Closed business represents assured revenue that will be received in the future. The third term is "business in a funnel". This is a reference to potential work, contracts not yet finalised that may or may not materialise and turn into actual revenue producing work. A sales executive's funnel is a calculated educated guess by the sales executive as to what is going to happen in the future.

[146] At the respondent's weekly group sales meetings print-outs of the sales data are distributed and discussed so each sales executive is aware of his or her colleagues' results. Some of this sales data was entered into evidence.

[147] This includes a monthly sales calculation chart for the applicant from 2011 that shows her billed business in 2011 was \$871,287.14, meaning she achieved only 44% of her sales target for that year, which was \$2M. This is the document that indicates on its

face it was printed out the same day as the applicant complained to Peter Jeffs about Men's Day.

[148] The chart also shows that the applicant's billed business increased each quarter throughout the year; in the last quarter her sales were two and a half times more than in the first quarter. However, if the applicant had sales in the first three quarters of the year equivalent to what she achieved in the last quarter, she still would have only achieved \$1.2M in total sales for the year. I take this to mean that throughout the entirety of 2011 the applicant's sales were below target but there is some evidence of an upwards trend. This chart also shows that as a result of the applicant's poor sales in 2011, the amount she had been paid as a guarantee against commission earned exceeded what she was entitled to.

[149] I would point out that there is a slight discrepancy in the documentary evidence with respect to the revenue attributable to the applicant in 2011. When Ken Ryder sent the applicant the performance evaluation forms for 2011 on January 31, 2012, he indicated on the form that her sales in 2011 were \$880,252, which is slightly higher than the detailed sales chart for the same period. No evidence was led with respect to the reason for this discrepancy and it was not raised by the parties in their submissions.

[150] The other data the Tribunal was given with respect to 2011 is a chart showing closed business from January 1 to November 21, 2011. Because it does not cover the entire year it is less helpful than the sales report. However, it shows that in that period the applicant closed business totalling \$885,258, which represents just over 10% of the respondent's total. In contrast, Terry Potter's closed business over that period represents 8.5% of the total, and Mike Gelesz's represents 49%. The closed business data for this period in 2011 does not indicate the same kind of upward trend for the applicant as the billed business does. Her monthly numbers go up and down and in May and October, 2011, she closed no new business. The four highest figures occur in the months of January, April, September and November. Despite what this data shows the applicant says her focus increased in the latter half of 2011 and her results improved.

[151] In discussing the applicant's closed business in 2011, Ken Ryder says it was less in the latter half of the year than in the first; and in the latter half of the year there were two months with no new business being closed. I accept his first statement about the amount of closed business the applicant did in the two halves of 2011 based on the evidence before me, but Mr. Ryder's second statement about there being no closed business in two months of the last half of the year is not supported by the totality of the evidence.

[152] As stated above, neither party entered into evidence sales data showing closed business for the entire 2011 year. The applicant filed with the Tribunal the chart discussed above that shows closed business for the period ending November 21, 2011. That chart shows closed business for the period January 1 to June 30, 2011, totalling \$530,560. For the period July 1 to November 21, 2011, it shows a lesser amount, \$354,698. However, the applicant states that she did have closed business in December, 2011, as a contract was signed with respect to her largest house account. This statement was not rebutted or challenged by the respondent, but the applicant did not indicate the value of that closed contract nor did she lead any evidence in reply to rebut Mr. Ryder's statement despite given the opportunity to do so. As a result, I accept that it is more likely than not that Mr. Ryder is correct and the applicant's closed business in the latter half of 2011 was something less than it was for the first half of 2011.

[153] However, the closed business report ending November 21, 2011, does not show two months in the latter half of 2011 with no new closed business, only one (October). There is also one month in the first half of 2011 with no new closed business, namely May. As the respondent did not dispute the applicant's statement that she closed a contract in December, I accept her evidence in this regard. This means there were a total of two months in 2011 where the applicant had no new closed business, but they were evenly spread between the first and latter halves of the year.

[154] That being said, I took Mr. Ryder's evidence with respect to closed business in 2011 to mean that the applicant's assertion that her numbers improved in the latter part

of 2011 was not true. But he did not discuss the meaning the Tribunal should assign to the chart showing billed business in 2011 which as indicated above, clearly shows an increasing trend every quarter in 2011. The Tribunal was also not provided with any funnel reports for 2011 so it is not possible to determine the level of future potential business the applicant was generating in any part of 2011.

[155] In the end result, the conclusions I draw from the sales numbers with respect to 2011 are the following: the applicant's sales in 2011 were well below her annual target and considerably less than she had achieved the previous year; there was an upward trend with respect to billed business but not with respect to closed business; and without funnel reports from 2011, it is impossible to determine whether or not the applicant's overall sales were steadily improving or not.

[156] With respect to 2012, the Tribunal was provided with one chart showing closed business for the period January 1 to the end of February, 2012, and another from January 1, 2012, to April 17, 2012. The earlier chart shows the applicant as having closed business of \$813,610, which represents 35% of the respondent's total closed business in that period. In the later chart the applicant is shown as having closed business of \$828,730 for the period ending April 17, 2012, which represents 25% of the respondent's total closed business for that period.

[157] With respect to the applicant's closed business in the first quarter of 2012, Mr. Ryder describes February as an anomaly. The applicant closed a particularly large contract in that month involving a house account that had been months in development; I took this to mean it is unreasonable to assume her closed business total for the first quarter is a good predictor of what her closed business would be in subsequent quarters. Given the data available to me, this statement by Mr. Ryder that February, 2012, represents something of an anomaly appears to be true.

[158] The applicant also provided me with monthly billing reports for the first three months in 2012. Those reports do not identify the sales person associated with the account but they show billed business by client during the period. As best as I can tell

from these reports, the billed business related to the applicant's accounts during the first quarter of 2012 totals \$341,670. Adding this amount to the total closed business for the same period results in total sales attributable to the applicant's accounts of \$1.17M; the parties' evidence that her sales in the first quarter of 2012 were \$1.2M is supported by the raw sales data provided.

[159] According to Ken Ryder, he made the decision to terminate the applicant in consultation with Peter Jeffs, Darryl Sennick and the controller. The respondent entered into evidence a funnel report dated March 1, 2012. Mr. Ryder says he looked at this document when coming to the decision to terminate.

[160] The respondent relies on its sales executives to estimate future sales based on the prospects they are working on. The executive lists the sales opportunity they are exploring, the approximate value of the potential contract, and a percentage corresponding to how likely the sale is to materialise.

[161] With respect to the percentage, it is tied to how far along the discussions are with the client about the possible contract. So a high percentage like 80 to 85% would be assigned to a contract where an oral commitment has already been made and the respondent is simply awaiting formal approval; 60 to 65% might be assigned where a formal proposal was made and is seriously being considered by the client; 30 to 40% might be assigned where the sales executive has submitted pricing information for the project; and 20 to 25% for the qualification or pitching stage. The respondent's computer programme then automatically produces a weighted value which is the estimated value of the contract if awarded multiplied by the percentage attached to the likelihood of the opportunity following through to completion. This means the weighted value represents a best guess by each sales executive of what they are going to be bringing in as closed business in the near future.

[162] The March 1, 2012, report covers the period March 1 to June 30, 2012. Sales opportunities associated with the applicant only appear in the March 1 to April 30, 2012, period. The weighted value assigned to all of her listed sales prospects during that

period totals \$277,120. In comparison, the weighted value of Terry Potter's accounts for the same period totals \$192,600; however, the months of May and June, 2012, indicate Mr. Potter's potential sales for the entire period covered by the report were over \$900,000. That being said, the probability attached to those latter prospects was relatively low.

[163] Mr. Ryder says that when he looked at this report and made the decision to terminate the applicant's employment, he made handwritten notes on his copy of the report summarising his calculations and those notes still exist but were not produced to the applicant or entered into evidence before me. However, each time he cites a number from the funnel data in giving his evidence, the numbers he refers to cannot be found on the March 1, 2012, funnel report; rather, they are drawn from the one dated March 19, 2012, which was also entered into evidence before me.

[164] On cross-examination Mr. Ryder was asked why he did not believe the applicant was on track to achieve her sales target in 2012 given she had booked and closed business of \$1.2M by her termination date of March 19, 2012, and her target for the year was \$2.4M. He explains his point of view by raising the points indicated above about the applicant's booked and closed business for 2012, but also points to her funnel as of March 1, 2012.

[165] The March 1, 2012, funnel report shows a weighted value of the applicant's possible future sales totalling \$277,120. In Mr. Ryder's testimony, when discussing the amount that was in the applicant's funnel as of the date he was making the decision to terminate he cited the figure of \$308,000, which appears to be from a funnel report provided to me by the applicant for the period ending March 19, 2012, as the weighted value there totals \$308,120. This discrepancy might arguably support the proposition that Mr. Ryder did not actually look at the March 1, 2012, funnel report when deciding to terminate the applicant's employment as he claims. Alternatively, Mr. Ryder may have referenced the March 19, 2012, numbers because they represent the best snap shot in time available to the Tribunal on the date of the actual termination. As neither party

asked for an explanation of this discrepancy to give Mr. Ryder a chance to explain, I am not prepared to give it any weight in assessing his evidence or credibility.

[166] That being said, Mr. Ryder's point with respect to the funnel was two-fold. First, if one assumes similar activity for the year, the funnel amount of \$308,120 in the first quarter means the applicant was not on track to reach her sales target in 2012. Further, because no opportunity is 100% assured, a funnel represents the bottom of a pyramid where billed business represents the top; a funnel needs to be as large as possible to assure a respectable figure for billed business, which represents actual revenue. His second point about the data with respect to the applicant's funnel is similar to his point with respect to the 2012 closed business data: 74% of the applicant's total funnel was attributable to a single contract with a weighted value of \$228,000 that involved a house account.

[167] With respect to the issue of predicting the applicant's future sales for the period after her termination, the applicant entered into evidence two additional funnel reports. Both are dated after the applicant's employment ended and cover the period May 1, 2012 to December 31, 2012. Although the applicant's name does not appear on these reports, accounts that were in her vertical do. A report dated May 28, 2012, shows a total weighted value of contracts within the applicant's vertical of \$430,968; one dated June 1, 2012, shows a total of \$346,776. The applicant asserts that these reports reflect future projected sales she was responsible for generating. This may or may not be true, but without knowing more about the specific projects, when they were entered into the funnel, or hearing evidence from the new sales executive assigned to the account, the applicant's belief about what the data shows is based on assumptions that cannot be verified. Even assuming the applicant was responsible for generating these prospects, the reports do not necessarily support the applicant's contention that she would have reached her sales target in 2012. The reports are predictors only, and if it is true as Mr. Ryder says that a funnel represents the base of a pyramid where billed business is the top, then the numbers in the reports are too low. That being said, if some of the large potential contracts with the larger house accounts within the applicant's funnel had

come to fruition, she may have met her sales target, albeit without attracting new customers.

[168] With respect to the 2012 sales data it is impossible for the Tribunal to say whether or not the applicant would have achieved her sales target for 2012. What is evident, however, is that as of March 1, 2012, when the respondent says it made the decision to terminate the applicant's employment, her sales for 2012 were clearly on track to exceed those in both 2011 and 2010.

[169] I would note that one of the evidentiary disputes between the parties about the sales data concerns the applicant's largest account. It was the same house account that the applicant and another employee successfully re-established a positive relationship with. Commissions are earned on all sales whether or not the sales professional assigned to the account was actually involved in acquiring the new business. The applicant was asked in cross-examination a hypothetical; namely, if that client discussed a new project with the technical people working on an existing project and based on those conversations a new contract was signed, would the sales executive still receive the commission. The applicant's answer is that although the answer to the question is true, with respect to her largest client that did not in fact ever occur. In contrast, Darryl Sennick says the technical staff generated sales within the applicant's largest account without input from the applicant. The evidence before the Tribunal is insufficient to resolve this dispute, but doing so is not necessary to resolve the issues in this Application.

[170] With respect to the sales data Terry Potter testified that he was aware of the applicant's sales throughout 2012 as each executive's sales were discussed in the weekly sales meetings. Mr. Potter states that when the applicant's employment was terminated he believed it was due to her complaints about Men's Day because of its timing and because her sales were going so well; he remembers this because he recalls feeling envious about her rising numbers. Mr. Ryder says in response to this evidence that the data available to Mr. Potter was not the same as was available to him. This

statement was not refuted by the applicant so I accept that Mr. Ryder was in a better position than Mr. Potter to see all of the relevant sales data.

OTHER PERFORMANCE CONCERNS

[171] Although Mr. Ryder states that the biggest factor in the respondent's decision to terminate the applicant's employment was her sales numbers, evidence was led with respect to other performance concerns not mentioned above in the context of the applicant's 2010 performance review. Those include incidents of the applicant being late to meetings, a "lack of engagement", and a failure to work cohesively with technical staff assigned to her accounts. I find that the evidence with respect to these performance concerns is insufficient to establish that they were a factor in the respondent's decision to terminate.

[172] Mike Gelesz corroborated the respondent's evidence that there was some concern about the applicant being late for meetings. The applicant acknowledges this happened but states it was a very rare event. Darryl Sennick says there were two or three instances of lateness to client meetings he is aware of and some that occurred with respect to internal meetings held in the morning. No evidence was led with respect to when this occurred, or if it was ever raised with the applicant as a concern. Mr. Ryder also did not state this was part of the reason for the applicant's termination. As a result, the evidence is insufficient to establish this issue is related to the termination of the applicant's employment.

[173] Both Mr. Sennick and Mr. Ryder use the phrase "lack of engagement" to describe the applicant's behaviour after November 2010. I take this to mean that after the applicant's separation her demeanor changed and she appeared less enthusiastic and committed. The applicant acknowledges that the separation and divorce upset her and her demeanor changed as a result, but denies that means her commitment to her clients ever waned. She also states that although the separation and divorce made her sad and she concedes that affected her aspect, she was back to herself sometime in the second half of 2011. According to Mr. Ryder this lack of engagement continued up

until the applicant was terminated. However, when Mr. Sennick was asked about it he said things went up in late 2011 or early 2012. No evidence was led to indicate the applicant was ever told her demeanor was a concern. Given the inconsistency between the respondent's witnesses, I believe it is more likely than not that the applicant's demeanor returned to what it was prior to her separation sometime after the summer of 2011. Based on that conclusion and the fact the applicant's demeanor was apparently never raised as a concern with the applicant, it also seems unlikely to me that this issue is related to the termination of the applicant's employment.

[174] The respondents led evidence with respect to a single incident where the applicant prepared a draft sales proposal in which she misstated the hourly rate associated with the work the technical staff on that project would do. This mistake was caught by one of the technical staff prior to the proposal being issued. The respondent entered into evidence an e-mail string dated December 1, 2011, related to this incident. In the final e-mail in the string the controller says the following to Peter Jeffs:

This is the stuff that absolutely pisses guys like [the technical person who spotted the mistake] and [Mr. Sennick] off. Total lack of attention to detail.

Both Terry and Sherry (*sic*) have this tendency. I personally do not trust their documents and unfortunately I often do not see this stuff until too late.

We need a review process that does not include [the technical person who spotted the mistake] and [Mr. Sennick].

[175] With respect to this incident, the applicant does not deny that it occurred but states that ensuring the correct amount was inserted for technical staff hourly rates was not her responsibility. I took this to mean that Mr. Sennick is correct when he says that there is an expectation that statement of work documents be jointly created between the sales and technical staff. I would also observe that Mr. Potter is described in this e-mail as having a tendency to make similar mistakes. Given this evidence and Mr. Ryder's statement that the reason the respondent terminated the applicant's employment was because of her sales numbers, I am not satisfied this incident is related to that decision.

OTHER EVIDENCE WITH RESPECT TO TERMINATION

[176] Both Mike Gelesz and Ken Ryder state that prior to his departure in December, 2011, Mr. Gelesz was considered to part of the inner circle of the management team. He was involved in management discussions involving termination of employees and restructuring. He was the most senior sales executive at the time and his vertical represented about 60 to 70% of the respondent's revenue.

[177] Mr. Gelesz was asked in examination-in-chief if at the time of his departure in December of 2011 he had any inkling that the applicant's employment was in jeopardy. His reply to this question is "absolutely not". He states he was of the opinion at the time that her role was very secure. In part this was because with his departure she would become the most senior sales executive. The respondent's intent was to hire additional sales people and they would need time to ramp up; as the applicant's performance was improving, given her seniority he felt she was critical, which is why he believed her employment at that time was secure. He remained part of the inner circle of management up until his departure and he left on good terms with the respondent, which had asked him to stay in his position.

[178] The respondent entered into evidence an e-mail dated November 8, 2011, from Peter Jeffs to Ken Ryder. With the subject hearing "Coverage in [the applicant's] account – Vertical". It refers to an attached analysis requested by Mr. Ryder of "our exposure for 2012 with [the applicant's] vertical and key accounts" but the attachment was not entered into evidence. No mention of this missing attachment was made during the hearing by either party. The e-mail goes on to say (paragraph breaks omitted):

My overall impression at this point is that there is little exposure. As per the attached, from the account base, not much other than the existing project with [the applicant's largest house account] and that exposure is not at the highest level. Don't forget, this is a house account and she did not bring it to [the respondent]. I will be covering that account as we get [the new sales executive] up to speed. I have reviewed our exposure with [Mr. Sennick] a couple of times to get his input and insight. He feels the only key exposure is the ability to have someone walking the floor at [the house account] and his work load might actually decrease. We might

actually make [Mr. Sennick's] life a little easier with someone who is more mindful of his and others time constraints. The relationships [within the house account] would need to continue which we will manage. It will not be easy but with focus and work is accomplishable. [The new sales executive] has no lack of energy and would work well getting up to speed on his main account. I would also be heavily involved supporting him and managing the relationships... [The controller] feels expenses dollars would be more wisely spent with this plan.

[179] Based on the evidence of Mr. Ryder I take this e-mail to mean that the respondent was considering terminating the applicant at the time. The applicant does not take issue with that interpretation. As a result, I am satisfied that the evidence indicates the respondent was actively considering terminating the applicant's employment in the period around November 8, 2011.

[180] When asked why the applicant's employment was not terminated in November, 2011, Ken Ryder replied it was because there were opportunities to continue to monitor and see if the situation could be rectified. Further, he states there were a lot of things on his plate at time and this issue was not as pressing as others. Also, the respondent had a long-standing relationship with the applicant and it is not quick to fire; there is an investment in an employee, a value to continuity and rhythm, a cost associated with replacement; and the respondent's philosophy is that it is always better to recover then fire and replace.

[181] The e-mail of November 8, 2011, indicates Darryl Sennick was critical of the applicant's performance, which is consistent with his evidence. He worked closely with the applicant through much of her employment. They jointly developed statements of work, which are proposals to pitch for new business. He was also the person the applicant would turn to if there were technical questions she could not answer or concerns about the work being done by the technical staff. Mr. Sennick was promoted around the same time that Peter Jeffs was hired and the applicant says that when Mike Gelesz left in December, 2011, Mr. Sennick picked up some of the tasks he had previously done. He agrees that this means that by January of 2012 his level of involvement with the applicant's work decreased. Mr. Sennick says that he was

consulted on the respondent's decision to terminate the applicant's employment and agreed with that decision but that discussion occurred before March, 2012. He did not say when the discussion did occur however, so it may have been during this period in November, 2011; the evidence is simply unclear on this point. Mr. Sennick also says he does not know all the reasons for the termination.

[182] According to Mr. Sennick, because Peter Jeffs was the vice-president of sales, he would have played a critical role in the decision to terminate the applicant's employment; he and Mr. Ryder would be the two people critical to that decision. He further states that if Peter Jeffs wanted to retain the applicant, Mr. Ryder would have entrusted that decision to him. Mr. Sennick believes this to be true because he and Mr. Jeffs occupied similar positions in terms of authority over subordinates and at the time Mr. Sennick was essentially in control of deciding termination issues with respect to the technical staff who reported to him.

[183] Mr. Ryder states at no time did Mr. Jeffs recommend the applicant be kept on, but if he had, Mr. Ryder would have seriously considered Peter Jeffs' wishes. Mr. Ryder says that Mr. Jeffs was of the view the applicant's employment should be terminated throughout, but it was Mr. Ryder who made the decision to terminate in March of 2012.

[184] In resolving this discrepancy between the respondent's witnesses concerning who was the deciding mind behind the termination decision, I have taken into account the fact that as president, Mr. Ryder is more likely to understand the lines of authority within the respondent. In addition, Mr. Sennick made assumptions about Mr. Jeffs' authority based on his experience of how things operated on the technical side of the business but is less likely to have reliable experience or knowledge as to how decisions are reached in the management and sales sectors. As a result, I accept Mr. Ryder's testimony in this regard over that of Mr. Sennick.

[185] Finally, in the fall of 2011 Peter Jeffs told the applicant to set up meetings so he could meet with her clients. In an e-mail dated December 2, 2011, he says the meetings "will help me get up to speed fast on your vertical and help you grow your 2012 plan".

The applicant suggests this indicates Mr. Jeffs intended to continue to work with the applicant as of December 2, 2011. Mr. Ryder states rather it merely reflects that his instructions to Mr. Jeffs at that time were to continue to work with the applicant. I take the December 2, 2011, e-mail as support for the proposition that in November, 2011, the respondent decided not to terminate the applicant's employment; but it is insufficient in light of all of the evidence before me to support the contention that Peter Jeffs wanted to continue working with the applicant as of that date.

CONCLUSION REGARDING TERMINATION OF THE APPLICANT'S EMPLOYMENT

[186] Based on the evidence set out above, I am satisfied that it is more likely than not that the applicant's complaints about Men's Day were related to the decision to terminate her employment. I say this for a number of reasons.

[187] The first reason is with respect to the timing of the decision. Mr. Ryder says the decision to terminate was made around March 1, 2012, and I accept that is the case. That date is five weeks after the applicant expressed her disagreement with him about the appropriateness of Men's Day. This timing was significant to Mr. Potter, who concluded the applicant's termination was directly related to her complaints because the termination decision followed so swiftly afterwards.

[188] Also related to timing is the uncontested evidence of the applicant that immediately after she complained things changed. She was excluded from a client meeting and a networking opportunity; her one-on-one supervision with Mr. Jeffs stopped; and Mr. Jeffs and Mr. Ryder seemed uncomfortable in her presence. As stated above, absent any other rationale for this behaviour, it clearly supports the conclusion that the applicant's complaints about Men's Day caused her to lose favour in the eyes of the respondent's management. Even Mr. Ryder agrees that the cessation of one-on-one supervision meetings with Mr. Jeffs indicates he no longer wanted to work with the applicant.

[189] Third, although there is sufficient evidence to conclude the respondent had concerns about the applicant's performance continuously from a time prior to March, 2012, it did not terminate her employment at any of the points in time when the evidence indicates it was actively considering her performance: in March, 2011, when her 2010 performance evaluation is completed; in the summer of 2011, when the applicant announces "I'm back" but the respondent disagrees as seen through the re-organization exercise; and in November, 2011, when there is an explicit discussion about it.

[190] This tends to support the conclusion that something happened after November, 2011, and before March 1, 2012, that changed the respondent's mind about retaining the applicant in its employ.

[191] Mr. Ryder's testimony touched on this issue when he was asked why the applicant's employment was not terminated in November, 2011. He says there were opportunities to continue to monitor and see if the situation could be rectified but that was true at any point in time and no explanation was offered as to why it was not also true in March, 2012. He also says there were a lot of things on his plate in November, 2011, which I took to mean by March, 2012, he had more time on his hands. This statement seems to contradict the evidence in that in October, 2011, Mr. Ryder stepped back from his role supervising the sales executives and Peter Jeffs took over those functions. Absent additional evidence as to Mr. Ryder's activities, it is reasonable to conclude that it was in November, 2011, that Mr. Ryder would have found himself with more time on his hands, not in March, 2012. Mr. Ryder also says this issue was not as pressing as others but no information was provided as to what priorities surpassed those presented by the applicant's employment status. He also says the respondent had a long-standing relationship with the applicant and it is not quick to fire; but that statement was as true in March, 2012, as it was in November, 2011, if not more so.

[192] I find these explanations for the timing of the decision to be less than persuasive; they are unverifiable, or unsupported by the evidence, or equally applicable to points in time before and after the applicant's complaints about Men's Day.

[193] The only concrete events that occurred during the period between November, 2011, and March 1, 2012, were the applicant's complaints about Men's Day and the increase in the applicant's closed and billed business. As the latter event is one that would logically support retaining the applicant in its employment, I am satisfied the applicant's complaints about Men's Day was the only event during that period that might have caused the respondent to change its mind about continuing the applicant's employment.

[194] I am reinforced in this regard by the evidence of Mr. Gelesz, who was in management's inner circle and could assess the applicant's position with the respondent. In his view, as of December, 2011, the applicant's employment was very secure due to her seniority, the fact of his departure, the respondent's intention to expand its sales staff, and her improving performance. Mr. Gelesz left the respondent's employment on good terms. The respondent did not challenge his ability to make this assessment of the applicant's employment. As a result, I accept Mr. Gelesz's evidence in this regard.

[195] Based on all of the above, I am satisfied that it is more likely than not that the decision to terminate the applicant's employment was related to her complaints to the respondent about Men's Day.

The Issue of Intent

[196] As indicated above, the final element in the analysis in a reprisal claim as identified in *Noble v. York University*, above, is with respect to intent. Did the respondent intend to reprise against the applicant for complaining about Men's Day when it excluded her from meetings, ceased one-on-one supervision, and terminated her employment?

[197] In this Application there is no direct evidence of intent. In discussing this issue, the Tribunal says in *Noble v. York University*, above, at paras. 31-32:

In order to prove reprisal, a complainant (now an applicant) must establish

that the respondent engaged in an action, or threat, which was intended as a retaliation for the claiming or enforcement of a right under the *Code*. Unlike an allegation of discrimination, where intention is not a necessary element to prove a violation, where reprisal is alleged, the complainant must establish that the action was taken with an intent to punish or retaliate. See: *Jones*, supra; *Jones v. Amway of Canada Ltd.*, 2001 CanLII 26217 (ON HRT); *Ketola v. Value Propane Ltd.*, 2002 CanLII 46510 (ON HRT); *Moffatt v. Kinark Child & Family Services* (1998), 35 C.H.R.R. D/205 (Ont. Bd. Inq.).

The complainant disputed this principle. He argued that a complainant cannot know what is in the mind of a respondent. This may be true, and **in many cases, there may be no direct evidence of a respondent's intention to reprise. Reprisal, like discrimination, is rarely practiced openly. However, this does not negate the well-established principle in reprisal cases, nor does it prevent a complainant from proving intent. Intention may be proved by inference, drawn from the whole of the evidence.** Longstanding human rights jurisprudence provides that where a complainant has established sufficient facts, which if true, would support a finding that the *Code* has been violated, the evidentiary onus then shifts to the respondent, to provide a reasonable explanation for the impugned conduct. It then falls to the complainant to provide evidence of why the explanation is not credible, or is a simply a pretext. The Tribunal will examine all of the evidence and determine, on a balance of probabilities, whether a violation of the *Code*, in this case a reprisal, has been proved. [Emphasis added.]

[198] I take this to mean that where there is no direct evidence of intent, the surrounding circumstances may be sufficient to establish that a respondent's actions were intended to be a reprisal. Where that is the case, the respondent can negate liability by establishing a reasonable alternative explanation for the conduct.

[199] In *Smith v. Menzies Chrysler*, 2009 HRTO 1936 at para. 163, the Tribunal applied this principle as follows:

Applying the test of reprisal to the facts of this case, it is evident that the complainant's dismissal constitutes reprisal within the meaning of section 8 of the *Code* because I have found that the dismissal was precipitated by the complainant's objection to the poisoned work environment and his expressed intent to complain about sexual harassment. **As no respondent ultimately admitted to participating in the termination meeting, I do not have any direct and credible evidence to explain the respondents' reasons for the complainant's dismissal.** Based on

the proximity between the complainant demanding that something be done about Graham's sexually vexatious behaviour and the complainant's dismissal the very next day, I find that the corporate respondent's decision to terminate the complainant's employment was influenced by the concern that he was complaining about sexual harassment. [Emphasis added.]

[200] The reasons set out above, detailing why I have concluded the alleged actions of reprisal are related to the applicant's complaints, are sufficient to establish the rebuttable inference of intent described in *Noble v. York University*, above. To put it another way, a reasonable person whose performance appears to be improving, who has never explicitly been told their employment is in jeopardy, and whose employment is terminated five weeks after complaining about an incident of discrimination, where during those five weeks their supervisor stops meeting with them one-on-one, that person would be justified in believing there was a connection between the complaint and the termination.

[201] This means the next question is: is there a reasonable alternative explanation for the respondent's actions?

[202] In this Application the respondent advances the position that an intent to reprimand on the part of the respondent cannot be inferred for the following reasons: Ken Ryder reasonably believed the issue of the applicant's concerns about Men's Day had been addressed; the termination decision was based on the applicant's projected sales numbers only, and as such was a business decision the respondent was entitled to make; and in order to find intent on the part of the respondent, the Tribunal must find Mr. Ryder to be a not credible witness as he says he was the one making the decision to terminate and it was not made in response to the applicant's complaints.

[203] With respect to the actions the applicant alleges are reprisal, other than the decision to terminate her employment, the second and third of the respondent's arguments above are not relevant. As to the submission that Ken Ryder reasonably believed the issue had been addressed, that submission is based on the evidence with respect to the e-mail correspondence about the complaint, the history between the

parties, and the fact that the applicant did not raise the issue again until her termination interview. If I understand the respondent's position correctly, the respondent is essentially saying that as Mr. Ryder believed the issue was behind him, it could not have been in his mind in subsequent dealings with the applicant. There are a number of difficulties with this submission.

[204] First, and continuing to address only the actions complained of not related to termination, those actions were perpetrated primarily by Peter Jeffs. Therefore, Mr. Ryder's alleged belief he had put the issue behind him does not speak to Mr. Jeffs' intent in ceasing one-on-one meetings with the applicant, or excluding her from the one client meeting, excluding her from the networking opportunity, or being tense in her presence.

[205] Second, the e-mail correspondence between the applicant and Mr. Ryder concludes with the applicant telling Mr. Ryder they would just have to agree to disagree. A reasonable person would not interpret that to mean the applicant was satisfied with Mr. Ryder's response; rather, it indicates the exact opposite. As a result, I do not accept the proposition that the e-mail correspondence supports the conclusion that Mr. Ryder believed the issue had been dealt with.

[206] Third, the applicant was not asked in cross-examination why she did not raise the issue again after that e-mail exchange; if she had been asked, she might well have offered a reasonable explanation like she felt she had taken the issue as far as she could – in the absence of putting the suggestion to the applicant, I am not prepared to accept the interpretation the respondent puts on her silence; namely, that she was also satisfied with the response to her complaint.

[207] Fourth, the history between the parties does not paint the picture the respondent urges on me; rather it indicates that although Mr. Ryder was supportive of the applicant throughout her separation and divorce, her gender was an issue for him in that it caused him to say and do things that he would not have done if the applicant was male, and the

applicant was aware of that. Given this context the respondent's assertion that the applicant trusted in Mr. Ryder's values is not reasonable.

[208] What this means is that with respect to the actions of alleged reprisal that the applicant complains of other than the termination of her employment, the respondent has not rebutted the inference of intention. As a result, I am satisfied that when the respondent excluded the applicant from meetings and ceased offering one-on-one supervision, the respondent breached s. 8 of the *Code*.

[209] With respect to the termination issue the respondent also asserts that the inference of intention is rebutted by way of the evidence with respect to the applicant's sales numbers, and the contention that the evidence establishes Mr. Ryder was the deciding mind and his evidence is credible. I disagree.

[210] As stated above, the sales data at the time of the applicant's termination supports the conclusion that the applicant was on track to do better in 2012 than in both 2010 and 2011, albeit not necessarily at the revenue level the respondent says was necessary. As a result, the assertion by Mr. Ryder that the decision to terminate the applicant's employment was based solely on those sales numbers is not credible.

[211] I would also observe that Mr. Ryder's credibility is undermined by some but not all of the discrepancies between his evidence and that of Mr. Sennick. Mr. Sennick states he was not consulted about the decision to terminate in March, 2012, but rather it was earlier than that; whereas Mr. Ryder states when he made the decision March 1, 2012, he did so in consultation with Mr. Sennick among others. Mr. Sennick also agrees with Mr. Gelesz and disagrees with Mr. Ryder that at the end of 2011 the applicant's numbers improved.

[212] The applicant urged me to make an adverse finding of credibility on the basis that the respondent had not called Peter Jeffs as a witness. The respondent provided me with the Tribunal's decision in *Farias v. Chuang*, 2005 HRTO 22. I am of the view that as Mr. Jeffs is no longer employed by the respondent, and as his employment was

ended by the respondent, it is not appropriate or necessary to draw an adverse inference in the circumstances of this case.

[213] Based on all of the above, I find that the evidence establishes that it is more likely than not that the respondent's decision to terminate the applicant's employment was, at least in part, an intentional response to the applicant's assertion of her right to a workplace free of sex discrimination. By terminating her employment the respondent breached s. 8 of the *Code*.

REMEDIES

[214] The applicant seeks as remedies monetary compensation pursuant to s. 45.2(1)1 of the *Code* for losses arising out of the infringements of the *Code* and for injury to dignity, feelings and self-respect.

Losses Arising from the Infringements

[215] With respect to losses arising out of the infringement of the *Code* because of the applicant's exclusion from Men's Day, the applicant experienced no monetary loss except for the value associated with the goods and services she would have received if she had attended as a participant. The only evidence before the Tribunal with respect to the value of those goods and services is the cost of the day as set out in the brochure from the Mansfield Ski Club, which indicates it was \$150 per person.

[216] As to the breach of section 8 related to the exclusion from meetings and the cessation of supervision, there is no evidence before the Tribunal to indicate those events gave rise to a monetary loss for the applicant.

[217] The applicant also claims the value of lost wages and commissions for the period after termination of her employment. The respondent takes the position that the applicant is not entitled to lost wages or commissions because the evidence establishes that the applicant's employment would have been terminated by the respondent in any case if Men's Day had never occurred, and she received the compensation she was

entitled to on termination under her employment contract. In support of this position the respondent relies on the Tribunal's decision in *Williams v. Children's Aid Society of Toronto*, 2011 HRTO 265 ("*Williams*").

[218] In *Williams* at para. 206, the Tribunal finds that a contract for providing foster care services between the applicant and respondent would have been terminated even in the absence of the discriminatory considerations that were part of the decision. As a result, the Tribunal states the applicant is not entitled to a remedy for the economic impact of the termination of the contract.

[219] It is very clear from the wording of s. 45.2(1)1 that losses like lost wages and commissions must flow from the infringement of the *Code* for the Tribunal to have the jurisdiction to award compensation for them. Therefore, I accept the principle in *Williams*. Where a respondent can show that an applicant's employment would have been terminated regardless of the discriminatory factors that were taken into account, the applicant is not entitled to compensation for lost income.

[220] The difficulty in applying this principle to the circumstances here is that the evidence does not support the conclusion that it is more likely than not that the applicant's employment would have been terminated regardless of her complaints. I say this because the evidence for the entire period between late 2010 and December, 2011, suggests that the respondent had performance concerns about the applicant throughout, but it nonetheless wanted to and chose to continue to work with her to support her growth and improvement. That is also true with respect to the November 8, 2011 e-mail as Mr. Ryder explicitly states one of the reasons the applicant's employment was not terminated at that time was because the respondent saw opportunities for her performance to improve. In other words, the evidence of the respondent's actions supports Mr. Ryder's statement that the respondent is not quick to terminate. Only when the respondent sees no hope for the future in the relationship does it terminate someone's employment; in the context of a sales professional like the applicant, that is all about the sales numbers. As the applicant's sales numbers were clearly going to be better in 2012 than in either 2010 or 2011, it seems more likely than

not that the applicant's employment would have continued but for her complaints about Men's Day. Therefore, I am satisfied the applicant is entitled to losses arising out of the termination of her employment.

[221] The applicant received salary from the respondent for the period ending four weeks after March 19, 2012, or up to April 15, 2012. The evidence with respect to the applicant's job search supports the conclusion that she reasonably mitigated her losses and found alternative employment commencing October 9, 2012. Therefore, she is entitled to lost wages for the period April 16, 2012 to October 8, 2012, inclusive, less statutory deductions and applicable taxes.

[222] The applicant also requested lost commission earnings for that period. It is not clear to me that the applicant experienced any loss in commissions and if she did, the evidence is insufficient for the Tribunal to calculate it with any accuracy. I say this because the documentary evidence seems to indicate that commission was payable on billed business, not closed business. As of the date of the applicant's termination her billed business was just over \$300,000. According to her contract, although there was an advance on commission, it was still calculated based on sales over \$800,000. That means that whether or not the applicant would earn commission in the period up to October 9, 2012, would depend on how quickly the business she had closed was billed. As it is possible it might have taken longer than that for her closed business to become billed, she might not have been entitled to any commission. Absent evidence with respect to when the applicant's closed business was billed after her employment was terminated, it is impossible to know if she would have received any commission at all for the period up to October 9, 2012.

[223] As to the period October 9, 2012, onwards, I am satisfied that the respondent should not be held liable for whatever difference in salary and benefits that exist between the applicant's new position and her old. The differences between the two compensation regimes are minor and consist basically of \$4,000 in annual salary and one week vacation. The primary difference is that commission in the applicant's job is not payable in advance from a draw account; rather it is only payable when earned.

That is a significant difference in timing of payment but not in total amount payable. The applicant entered into evidence an offer of employment from her new employer that seems to imply commission is payable once her sales exceed her salary but no details are provided as to how it is calculated. As a result, it is impossible to compare the commission regimes between the two positions. Therefore, the evidence supports the conclusion the applicant's new position essentially made her whole with respect to lost income effective October 9, 2012.

Compensation for injury to dignity, feelings and self-respect

[224] As the wording of s. 45.2(1)1 indicates, monetary awards under the *Code* are compensatory in nature and not punitive. The intention is that an applicant will be put back into the position he or she would have been in but for the discriminatory conduct. (See: *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC) at para. 150.)

[225] *Lane*, above, also says (at para. 153):

Among the factors that Tribunals should consider when awarding general damages are humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment.

[226] In *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, the Tribunal expanded on the factors to consider as follows (at paras. 51-54):

Cases with equivalent facts should lead to an equivalent range of compensation, recognizing, of course, that each set of circumstances is unique. Uniform principles must be applied to determine which types of cases are more or less serious...

The Tribunal's jurisprudence ... has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination...

The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious.

[227] As is indicated in *Lane*, above, there is no fixed formula for the Tribunal to follow to assess a monetary compensation award (at para. 157), there is no limit to the amount that can be awarded, and the quantum must not be set too low because that would "trivialize the social importance of the *Code*" (at para. 152).

[228] In this Application, the Tribunal has found three infringements of the applicant's rights under the *Code*. Each of those must be taken into account when applying the principles above and assessing compensation for injury to dignity, feelings and self-respect.

[229] The applicant led little evidence with respect to the impact on her of the respondent's decision to exclude her from the customer appreciation event that was Men's Day. Certainly she states she was very embarrassed when her client told her about the Hooters Girls and massage details. The applicant says she was concerned and upset about Men's Day because it indicated to her that the respondent did not share her values; also, it was largely responsible for her decision to start actively seeking alternative employment around January 10, 2012. In her e-mail complaint to Ken Ryder she states it was disheartening. This is similar to her reaction when Mr. Ryder disagreed with her about Men's Day; she was disappointed.

[230] The applicant relies on the Tribunal's decision in *Pieters v. Peel Law Association*, 2010 HRTO 2411, aff'd 2013 ONCA 396 ("*Pieters*"), in terms of providing a comparator for the purposes of quantum. In that decision the Tribunal finds that the respondents tried to prevent the applicant lawyers from using the lawyers' lounge in a courthouse and that their race was a factor in that treatment and awards both applicants \$2,000 for compensation for injury to dignity, feelings and self-respect. The applicant argues that in comparison, her exclusion from Men's Day was more serious in that it struck at the core of her job and her relationship with a client and therefore she should be awarded \$7,500.

[231] Although I would agree with the applicant that *Pieters* involves a single incident, it occurred in the context of a service where there was no ongoing or continuing relationship with the respondents. That being said, *Pieters* has echoes of the instant case in terms of objective criteria, by which I mean *Pieters* involved a law association library in a courthouse where one would objectively expect a relatively high degree of sensitivity to human rights issues involving race; in this Application, the respondent is a male-dominated business operating in a male-dominated industry, and had taken the time to develop comprehensive discrimination and harassment policies; that would reasonably lead one to assume that it should be sensitive to gender issues.

[232] The applicant referred to no other cases and the respondent offered no submissions with respect to quantum.

[233] Having considered all of the above, I find that an appropriate amount of compensation for injury to dignity, feelings and self-respect with respect to the respondent's behaviour in excluding a female sales professional from an event specifically designed to deepen relationships between clients and the respondent in order to increase sales because of her sex is \$3,000.

[234] With respect to compensation for injury to dignity, feelings and self-respect for the respondent's actions other than termination of the applicant's employment that I have found to be reprisal, the applicant did not request a separate amount for those

actions. Rather she requests \$25,000 for compensation for injury to dignity, feelings and self-respect with respect to termination of the applicant's employment. Neither party referred me to case law with respect to quantum.

[235] In terms of evidence of impact on the applicant, she testified before the Tribunal that the termination left her shocked and surprised, at which point in her testimony she became tearful in the hearing room. She also states she was embarrassed and disappointed and it knocked her confidence; it was a depressing time but the biggest thing was the confidence issue. She also says she felt she was being punished for something she could not even believe was happening within a company in this day and age; she was scared as she lives on her own and has a mortgage.

[236] In *Chan v. Tai Pan Vacations*, 2009 HRTO 273, the Tribunal awarded \$15,000 for compensation for injury to dignity, feelings and self-respect where the applicant's employment was terminated as an act of reprisal. But in that decision, the respondent's fear the applicant would become pregnant again was also a factor in the termination of employment and a separate breach of the *Code*.

[237] In *Pilkey v. Guild Automotive Restorations Inc.*, 2012 HRTO 1522, the applicant's employment was terminated as an act of reprisal and there was an additional finding of discrimination on the basis of sex with respect to discipline. In that decision the applicant was also awarded \$15,000 for compensation for injury to dignity, feelings and self-respect.

[238] Similarly in *Morgan v. Herman Miller Canada Inc.*, 2013 HRTO 650, the applicant was awarded \$15,000 for compensation for injury to dignity, feelings and self-respect where his termination was found to be an act of reprisal and the employer failed to investigate his complaint of discrimination.

[239] Given all of the above, I find that \$15,000 is an appropriate amount for compensation for injury to dignity, feelings and self-respect with respect to the breaches of s. 8 of the *Code*.

DECISION

[240] The Tribunal makes the following Order:

- a. The Application is granted;
- b. The respondent shall pay to the applicant \$150 and lost wages for the period April 16, 2012 to October 8, 2012, inclusive, less statutory deductions and applicable taxes;
- c. The respondent shall pay to the applicant \$18,000 as compensation for injury to dignity, feelings and self-respect;
- d. The respondent shall also pay to the applicant pre-judgment interest on the full amounts due above, for the period March 19, 2012, to the date of this Decision calculated pursuant to s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- e. The respondent shall also pay to the applicant post-judgment interest calculated pursuant to s. 129 of the *Courts of Justice Act*;

Dated at Toronto, this 6th day of March, 2014.

“Signed by”

Ruth Carey
Member