

# Human Rights and Workplace Sexual Harassment: Case Updates

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THE CANADIAN  
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British Columbia Branch

**SHARP**  
WORKPLACES

Sexual Harassment  
Advice, Response,  
and Prevention for  
Workplaces

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## Byelkova v. Fraser Health Authority, 2021 BCSC 1312

### Background

- Complainant filed a human rights complaint against the FHA alleging that her supervisor sexually harassed her, that he became angry when she rebuffed him, and that this was a factor in her subsequent disciplinary proceedings led by her supervisor.
- The Respondents applied to dismiss the complaint without a hearing, which was granted by the B.C. Human Rights Tribunal



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## Applications to Dismiss

27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

- (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
- (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
- (c) there is no reasonable prospect that the complaint will succeed;
- (d) proceeding with the complaint or that part of the complaint would not
  - (i) benefit the person, group or class alleged to have been discriminated against, or
  - (ii) further the purposes of this Code;
- (e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;
- (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
- (g) the contravention alleged in the complaint or that part of the complaint occurred more than one year before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22 (3).

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## Application to Dismiss

[27] It is useful to describe the nature of an application under s. 27 of the *Code* to provide context for the appellants' arguments. That provision creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing. It is a discretionary exercise that does not require factual findings. Instead, a Tribunal member assesses the evidence presented by the parties with a view to determining if there is no reasonable prospect the complaint will succeed. The threshold is low. The complainant must only show the evidence takes the case out of the realm of conjecture. If the application is dismissed, the complaint proceeds to a full hearing before the Tribunal. If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, 223 B.C.A.C. 71 at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, 285 B.C.A.C. 276 at para. 31; *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49

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## Issues with the Tribunal Decision

The decision was patently unreasonable in:

- not addressing whether the alleged sexual harassment in itself could constitute an adverse treatment in breach of the *Code*; and
- concluding that the allegations regarding the investigation and termination had no reasonable prospect of success

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## Judicial Review Decision

Justice Crerar heard the judicial review and allowed the petition, finding that the Tribunal's failure to consider whether the sexual advances constituted sexual harassment was a patently unreasonable error.

He also held that the Tribunal's finding that there was no reasonable prospect that the complainant could demonstrate that the sexual harassment tainted the subsequent disciplinary proceedings was patently unreasonable

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[115] While the Tribunal may dismiss all or part of the complaint under s 27(1), insofar as the rationale for the s 27(1)(c) gatekeeping function is the efficient operation of the Tribunal, it may well be that no efficiency is gained by only dismissing half of the claim. Dismissing half of the claim could also later prove embarrassing, in the sense of prompting inconsistent adjudicative decisions or foreclosing otherwise appropriate findings due to past rulings: cross-examination of Mr Saran on the sexual harassment allegations, for example, could illuminate aspects of the investigation and termination.

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[87] As indicated in the quotations above, the decision focused on the admitted abundance of evidence supporting the investigation and termination, apart from any taint of sexual harassment or other discrimination based on a protected characteristic. For example, at para 86, the decision finds that the evidence “overwhelmingly supports that the Respondents *had a reasonable basis* for their conclusions that Ms. Byelkova had breached Health Authority policy and practice standards in the course of her employment.” Similarly, at para 87, the decision describes the issue as follows: “I have simply concluded that the evidence is not capable of supporting Ms. Byelkova’s theory that the allegations against her *were concocted and fostered solely* by Mr. Saran as a pretext to mask his true motivations” [both emphases added].

[88] With respect, these statements reverse the necessary analysis. As the decision recognised at para 53, a complainant need only show that a protected characteristic was one factor in the adverse treatment. She is not required to show that the protected characteristic was the sole, primary, or even a significant factor in the adverse treatment: *Stewart* at paras 24, 44-46 ...

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[91] Even if there were ample grounds to investigate and terminate the petitioner, the decision was obliged to consider whether the petitioner's protected characteristics could have played any role in that process, and if that process could have been tainted by discrimination. In many circumstances an employer will have adequate grounds to terminate a given employee. But if that termination is, in part or in whole, connected to or motivated by any of the employee's protected characteristics, it may nonetheless constitute discrimination under the Code: see, for example, *Bartley v. Eagle Landing Dental Centre*, 2020 BCHRT 186 at para 28.

...

[93] Again, it was not enough to conclude that there were ample grounds for termination such that it must be speculative to imagine sexual harassment or a protected characteristics to be a factor. The question to consider was: "is it possible that a protected characteristic or the sexual harassment was at least one, potentially minor, but one factor connected to the investigation and termination?" The failure to consider this question renders the decision patently unreasonable as an arbitrary exercise of discretion under *ATA*, s 59(4)(a).

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## **Byelkova v. Fraser Health Authority and another (No. 2), 2021 BCHRT 159**

- BC Human Rights Tribunal Reconsideration Decision regarding the Application to Dismiss
- Application to dismiss was denied; complaint is now heading to hearing



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## Respondent's Application to Dismiss Argument

- S.27(1)(b) - the conduct did not amount to sexual harassment
- The allegations ranged from perfectly benign to one instance of asking the complainant out and then not pursuing it further.
- Cited a number of cases where the conduct was not egregious, or bad enough, to amount to a contravention of the Code.

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**Tribunal found  
conduct in  
*Byelkova* could  
constitute a  
violation of the  
*Code***

**He was an older man, in a position of authority in the workplace**

**There was several interactions, which was unwelcome**

**She felt uneasy, uncomfortable, intimidated**

**After rejection, he became visibly angry**

**He used his authority over her to initiate an investigation which led to her termination (Para 17)**

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***Kang v. Hill  
and  
another  
(No. 2), 2011  
BCHRT  
154;***

C was an administrative assistant at the respondent's company:

- C and R had discussed intimate topics at work which led the respondent to believe that she was open to such discussions
- R then professed to have romantic feelings for C, which were not reciprocated
- C eventually quit her employment because the respondent refused to give her a raise

In *Kang*, the Tribunal concluded that the respondent did not violate the *Code* because:

- R did not assert power over C
- C was an active participant in some questionable conversations

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***Byelkova  
Decision:  
Kang Decision  
Problematic***

**"I find some aspects of this decision problematic and no longer consistent with a modern understanding of power dynamics and discrimination in the workplace: see eg. *The Sales Associate v. Aurora Biomed Inc. and others (No. 3)*, 2021 BCHRT 5 and *Araniva v. RSY Contracting and another (No. 3)*, 2019 BCHRT 97.**

(at para 19)

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***Brouse v. Nepa Holdings Inc. (cob Dairy Queen), [1996]***  
**BCHRD No. 7;**

C alleged that the workplace harasser:

- Stated if he was 20 to 30 years younger he would kiss and hug C
- She became uncomfortable and said she would leave
- He responded that she should leave before he did something he would regret
- He tried to hug her as she left and brought his face close to hers.

In *Brouse*, the conduct was found to not violate the code :

- Took into account that the two parties considered each other friends
- The single incident was not severe enough to violate the Code

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***Byelkova Decision:***  
***Brouse Decision***  
**Problematic**

“The BC Council of Human Rights took into account that the two parties considered each other friends, and held that the single incident was not severe enough to violate the Code. **As with *Kang*, I find the Council’s analysis in this case inconsistent in many respects with a modern understanding of sexual harassment at work.**

(para 21)

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## Modern Approach to Sexual Harassment and Gender Discrimination

- *The Sales Associate v. Aurora Biomed Inc. and others (No. 3)*, 2021 BCHRT 5
- *Araniva v. RSY Contracting and another (No. 3)*, 2019 BCHRT 97

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### ***The Sales Associate v. Aurora Biomed Inc. and others (No. 3), 2021 BCHRT 5***

[116] Women have long fought for the right to be evaluated on their merits. One persistent barrier to that goal is the conflation of a woman's worth with her appearance. .... telling a woman to smile ... calling her "beautiful" or commenting on her appearance ... calling a grown woman a "girl" ... The impact of this type of behaviour is to subtly reinforce gendered power hierarchies in a workplace and, in doing so, to deny women equal access to that space.

[118] Comments which erase the Sales Associate's name, and invite her to change her physical appearance to please others, served to widen the power gap between them in a way that was connected to the Sales Associate's gender and demeaning of her dignity.

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***Araniva v.  
RSY  
Contracting  
and another  
(No. 3), 2019  
BCHRT 97***

Tribunal found conduct amounted to sexual harassment because these incidents formed a larger pattern in which C was forced to contend with R's sexual desires as a condition of her employment.

- “The context of their relationship was one marked by an inherent power imbalance: Mr. Yule was her boss”: para 97
- At its root, sexual harassment is about an abuse of power: para 95, citing

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## **Take-Aways**

***Byelkova v.  
Fraser Health  
Authority and  
another (No. 2),  
2021 BCHRT 159***

- Some older human rights cases on sexual harassment are outdated and problematic
- The tribunal's understanding of sexual harassment has evolved
- The tribunal now considers the context of an employment relationship, including inherent power imbalances and gendered power hierarchies in the workplace

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**Ms. K v. Deep  
Creek General  
Store and  
Wooyoung Joung,  
2021 BCHRT 158**

**Challenging the  
“objectively  
unwelcome”  
criteria**



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**Ms. K v. Deep  
Creek General  
Store &  
Wooyoung  
Joung, 2021  
BCHRT 158**

Ms. K was a young female hired as a store clerk at the Deep Creek General Store by its owner, Mr. Joung

Incidents of Sexual Harassment & Discrimination Found:

- The Tribunal found that Mr. Joung seriously and negatively impacted Ms. K by:
  - making sexualized comments to her at work (paras 17–21)
  - propositioning her to have sex with him (paras 22–26)
  - after she declined to have sex with him, he then started to make false allegations about her work performance and created a toxic and poisoned work environment for her (paras 27–39)
  - he ultimately terminated her employment on false pretenses (paras 40–47)

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***Ms. K v. Deep  
Creek General  
Store &  
Wooyoung  
Joung, 2021  
BCHRT 158***

Incidents of Retaliation Found:

- The Tribunal found that after Ms. K had been fired and had commenced a human rights complaint, Mr. Joung retaliated against her by:
  - trespassing on the secluded property at which Ms. K and her sister were staying on at least three occasions, with one of the trespasses caught on a newly installed security camera in the middle of the night (paras 48 to 52)
- However, there was not enough evidence to link Mr. Joung to alleged retaliatory harassing calls and texts on Ms. K's unlisted cell phone number, with one caller informing her that her phone number had been written on a \$20 bill inviting people to call her for phone sex (para 55)

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***Ms. K v. Deep  
Creek General  
Store &  
Wooyoung  
Joung, 2021  
BCHRT 158***

Impact on Ms. K:

- The discrimination and retaliation Ms. K suffered had a long-term impact on her, including:
  - months of high-level anxiety with lower levels of anxiety continuing to this day (para 54)
  - loss of sleep, appetite, and sense of comfort, safety and security in her own home (para 53)
- In sum, the Tribunal found that "Ms. K was seriously and negatively impacted" causing "short-term and long-term harm" and that "she increasingly experienced stress, discomfort, anxiety, fear and illness" and that "her ability to sleep, eat, work, and enjoy her life was impacted" (para 58)

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***Ms. K v. Deep  
Creek General  
Store &  
Wooyoung  
Joung, 2021  
BCHRT 158***

Legal Analysis: Sexual Harassment Context

- In setting the legal context, the Tribunal acknowledged that:
  - sexual harassment was confirmed as a form of sex discrimination by the SCC over thirty years ago in *Janzen v. Platy Enterprises* [1989] 1 SCR 1252 (para 71)
  - since *Janzen*, we recognize that sex is not a matter of biology but gender and that transgender, gender non-conforming, and non-binary people are also at an increased risk of sexual harassment and violence (para 72)
  - sexual harassment is further recognized as an abuse of power often occurring in the context of a male employer exploiting his authority over an employee, but it can also occur in other contexts where men typically exercise gendered power (para 73)

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***Ms. K v. Deep  
Creek General  
Store &  
Wooyoung  
Joung, 2021  
BCHRT 158***

Legal Analysis: Sexual Harassment “Unwelcome” Criteria

- The Tribunal acknowledged that:
  - *Janzen* sets out the traditional non-exhaustive definition of workplace sexual harassment as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences” (para 76)
  - there is a line of human rights case law that a complainant must prove sexual harassment was “unwelcome” in an “objective sense” (para 77)
  - this objective test for determining whether sexual conduct is “unwelcome” was articulated in *Mahmoodi v. UBC and Dutton*, 1999 BCHRT 56 as “taking into account all the circumstances, would a reasonable person know that that conduct in question was not welcome by the complainant” (para 78)

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**Ms. K v. Deep  
Creek General  
Store &  
Wooyoung  
Joung, 2021  
BCHRT 158**

Legal Analysis: Challenging “Unwelcome” Objective Test

- The Tribunal declined to follow the *Mahmoodi* objective test for reasons articulated by Professor Bethany Hastie in her paper, “An Unwelcome Burden: Sexual Harassment, Consent and Legal Complaints” *Osgoode Hall Law Journal* 58.2 (2021) 419-45 (para 82):
  - it places an inappropriate burden on complainants, predominantly women, to avoid harassment and protest harassing conduct
  - the individual and transactional focus of the test minimizes the systemic nature of sexual harassment and gender-based discrimination in the workplace
  - it has further provided an entry point for gender-based myths and stereotypes to influence legal analysis

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**Ms. K v. Deep  
Creek General  
Store &  
Wooyoung  
Joung, 2021  
BCHRT 158**

Legal Analysis: Adverse Impact Test for “Unwelcomeness”

- A complainant can prove that sexual conduct was unwanted by establishing the adverse impact the conduct had on them (para 89)
- Citing *Friedmann v. MacGarvie*, 2012 BCCA 445, the Tribunal confirmed the emphasis is on whether the conduct “detrimentally affects the work environment or leads to adverse job-related consequences” (para 90)
- Citing *BCHRT v. Schrenk*, 2017 SCC 62, the Tribunal confirmed the key is whether the harassment has “a detrimental effect on the complainant’s work environment” (para 91)
- Citing *Byelkova v. Fraser Health Authority*, 2021 BCSC 1312, the Tribunal affirmed sexual harassment in itself can constitute adverse treatment required for a finding of sexual discrimination (para 92)

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***Ms. K v. Deep  
Creek General  
Store &  
Wooyoung  
Joung, 2021  
BCHRT 158***

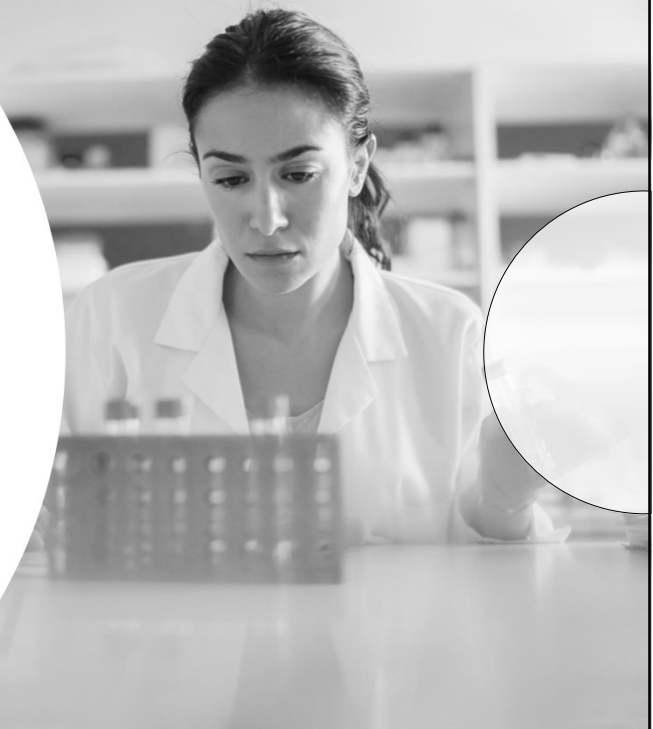
Adverse Impact Test for “Unwelcomeness” (cont.)

- “In summary, to find sexual harassment contrary to the *Code*, the Tribunal must determine that the conduct is unwelcome or unwanted. The burden on the complainant is to prove that they were adversely impacted by the sexualized conduct. If they do so, it is implicit in that finding that the conduct was unwelcome. It is open to a respondent to challenge an alleged adverse impact, so long as they do not rely on gender-based stereotypes and myths”. (para 93)

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**Human Rights  
and Workplace  
Sexual  
Harassment:  
Recent Legal  
Changes and  
Future Directions**

Professor Bethany Hastie



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## Defining Sexual Harassment

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“Unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.”

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

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## The “Unwelcome” Element

Provides an entry point for gender-based myths and stereotypes

May rely on evidence of active protest or objection

May scrutinize a failure to promptly report incident to authority

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***Basic v.  
Esquimalt  
Denture Clinic  
and another,  
2020 BCHRT  
138***

- [98] [...] the requirement that a complainant prove that the conduct in question was unwelcome shifts the focus of the legal inquiry towards their own behaviour. This may provide an entry point for myths and stereotypes to improperly influence legal analysis.
- [99] The incidents that give rise to allegations of sexual harassment in the human rights law context [...] will often occur in private and without corroborating evidence. Where the testimony of witnesses is irreconcilable, credibility assessments may become a deciding factor. There is a risk that credibility assessments may be tainted by myth and stereotype[,] [...]

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***Basic v.  
Esquimalt  
Denture Clinic  
and another,  
2020 BCHRT  
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- [104] I put the parties on judicial notice of three gender myths (common misconceptions) and stereotypes (oversimplified conceptions):
- First, **lack of protest** is a myth or stereotype that privileges those who expressly protest over those who are more likely to suffer in silence. The myth or stereotype -- that "real victims" will protest immediately -- may taint the unwelcome analysis by negatively impacting a complainant who is unable to present clear evidence of active protest in response to harassment.
- Second, **non-reporting** is a myth or stereotype that privileges those who resist and report immediately. The myth or stereotype -- that "real victims" will report immediately -- may taint the unwelcome analysis through assumptions of how women should respond to sexual violence and tendencies to blame women for the violence perpetrated against them.
- Third, **participation in prior behaviour** is a myth or stereotype that privileges those who do not have sexual experience. The myth or stereotype is that "promiscuous" or "party" individuals are more likely to consent or less worthy of belief. This may taint the unwelcome analysis by suggesting that past behaviour would mean that the respondent, or reasonable person, could not reasonably be expected to have known that the conduct was unwelcome.

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***Basic v.  
Esquimalt  
Denture Clinic  
and another,  
2020 BCHRT  
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- [100] [...] To avoid prejudicial reasoning, the reasonable person standard must be grounded in the social context of complaints involving sexual harassment. As it relates to this case, “taking into account all of the circumstances” means taking into account the impact of gender myths and stereotypes in the assessment of whether the conduct was unwelcome. [...]
- [...]
- [102] [...] what would reasonable people, who have taken the trouble to inform themselves on the topic of gender myths and stereotypes, know about the type of interactions that occurred [...]?

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## **Further Recognition of Gender-Based Myths and Stereotypes**

*Jamal v. TransLink Security Management and another (No. 2), 2020 BCHRT 146*

-Informs duties of employer during investigation

*The Employee v. The University and another (No. 2), 2020 BCHRT 12*

-Acknowledgment of myths and stereotypes  
-Maintains requirement to establish adverse consequence

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***Ms. K v.  
Deep Creek  
Store and  
another,  
2021 BCHRT  
158***

- Abandons the ‘reasonable person’ standard for assessing unwelcomeness;
- Aligns the test for sexual harassment with that of discrimination generally;
- Opens the door to further challenges regarding use of the ‘unwelcome’ element itself.

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***Ms. K v.  
Deep Creek  
Store and  
another,  
2021 BCHRT  
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- There is no “binding authority that requires a complaint to prove that a reasonable person would know the conduct was not welcomed.” (para 82)
- “[U]nwelcomeness can be proven by a complainant establishing that the sexualized conduct alleged had an adverse impact on them.” (para 83)

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**Ms. K v.  
Deep Creek  
Store and  
another,  
2021 BCHRT  
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The *Moore* test:

- (1) the complainant has a protected characteristic;
  - (2) they experienced an **adverse impact or treatment**; and
  - (3) their protected characteristic was a factor in the adverse impact or treatment
- “[T]he adverse treatment required for sexual discrimination can be the sexual harassment itself because it adversely affects the work environment” (para 90, quoting *Friedmann v. MacGarvie*, 2012 BCCA 445).
  - [93] [...] The burden on the complainant is to prove that they were adversely impacted by the sexualized conduct. If they do so, it is implicit in that finding that the conduct is unwelcome. [...]

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**Ms. K v.  
Deep Creek  
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another,  
2021 BCHRT  
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- “not every negative incident that is connected to sex will be discriminatory harassment contrary to the *Code*.”

*Hadzic v. Pizza Hut Canada*, [1999]  
BCHRTD No. 44, para. 33

- Understanding the relationship between the unwelcome element and the requirement to establish an adverse impact: future challenges?

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***Ms. K v.  
Deep Creek  
Store and  
another,  
2021 BCHRT  
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[87] Professor Hastie argues that that the unwelcome criterion is better addressed as part of a respondent's defence or justification [...]. This allows a respondent to raise a justification for their conduct where they took reasonable steps to ascertain the consent of the complainant or had a reasonable basis to believe their conduct was welcomed: Hastie 2021 at p. 449.

[88] The approach proposed by Professor Hastie may reduce the risk of reliance on gender-based myths and stereotypes about complainants in sexual harassment complaints. It reduces the burden on complainants to prove sexual harassment while safeguarding the ability of a respondent to raise a defence or justification that their conduct was consensual or wanted. This approach may be better equipped to address gender-based myths and stereotypes in cases of sexual misconduct and violence. This approach is worthy of further consideration, as justice systems, including this Tribunal, are tasked with responding effectively to sexual harassment. [...]