HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

O.P.T. and M.P.T.

Applicants

-and-

Presteve Foods Ltd. and Jose Pratas

Respondents

-and-

Justicia for Migrant Workers

Intervenor

DECISION

Adjudicator: Mark Hart

Date: May 22, 2015

File Numbers: 2012-10977-I and 2012-10978-I

Citation: 2015 HRTO 675

Indexed as: **O.P.T. v. Presteve Foods Ltd.**

APPEARANCES

O.P.T. and M.P.T., Applicants	)	Niki Lundquist, Counsel
Presteve Foods Ltd., Respondent	)	Gino Morga, Counsel, and Dominic Dadalt, Student-at-Law
Jose Pratas, Respondent	)	Laura Joy, Counsel, and Greg McGivern, Student-at-Law
Justicia for Migrant Workers, Intervenor	)	Grace Vaccarelli and Zahra Binbrek, Counsel

[1] These are two Applications alleging discrimination with respect to employment because of sex, sexual harassment, sexual solicitations or advances and reprisal contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[2] In brief, O.P.T. and M.P.T. were temporary foreign workers who came to Ontario from Mexico to work for the corporate respondent ("Presteve"), which operates a fish processing plant in Wheatley. The personal respondent was the owner and principal of Presteve at that time. O.P.T. and M.P.T. allege that during the course of their employment with Presteve, they were subjected to: unwanted sexual solicitations and advances by the personal respondent, including sexual assaults and touching; a sexually poisoned work environment; discrimination in respect of employment because of sex; and reprisal.

[3] More specifically, O.P.T. alleges that the personal respondent invited and took her out to dinner on many occasions when she did not want to go. She alleges that she felt compelled to do so under threat that the personal respondent would send her back to Mexico if she refused. She also alleges that the personal respondent told O.P.T. that he loved her and offered financial assistance for her children and housing for her in Mexico, which O.P.T. did not invite or accept. She further alleges that in the car while taking her out, the personal respondent did the following: on two or three occasions, he touched her legs over her clothes up to her vagina; on one occasion, he told her to pull her pants down and touched her bare legs and her vagina over her underwear; and on another occasion, the personal respondent undid his zipper and pulled her hand into his pants to touch his erect penis. O.P.T. alleges that she did not want to do these things but felt compelled to do so due to threats that the personal respondent would send her back to Mexico.

[4] O.P.T. alleges that on several occasions in the personal respondent's office at the plant, the personal respondent touched and squeezed O.P.T.'s breasts over her clothing; that on one occasion he forcibly hugged and kissed her; and that she did not invite or want him to do these things. She further alleges that at the house in Leamington where she was housed with the other female migrant workers from Mexico,

the personal respondent forcibly hugged and kissed her, told her to suck his penis on three occasions, and penetrated her with his penis on three other occasions. O.P.T. alleges that she did not invite or want to do these things but felt compelled to do so due to the personal respondent's threats to send her back to Mexico.

[5] O.P.T. also raises allegations about an incident that occurred on May 4, 2008, when the personal respondent called O.P.T. several times while she was out with friends, came to pick her up, tried to force her to give him her cellphone, tried to pry her cellphone from in between her legs, took her purse and emptied its contents on the side of the road, and forcibly pulled O.P.T. from the car. And finally, she alleges that sometime in late August or early September 2008, the personal respondent called her in Mexico and told her that he would be in Mexico and wanted to come visit her and her children at their home and said that he loved her.

[6] M.P.T. alleges that on her first day of work at Presteve, the personal respondent slapped her on the buttocks; that on two occasions in the personal respondent's office at the plant, the personal respondent touched her breast over her clothes; that on two occasions when in the car with the personal respondent when travelling to and from a doctor's appointment, the personal respondent sexually propositioned her and touched her on her thigh while doing so; that prior to the second appointment, the personal respondent also sexually propositioned her; and that sometime in March 2008, the personal respondent told her that she could not go out for a coffee and threatened to send her back to Mexico if she did, stated that she needed to apologize to him for being disrespectful, and sent her back to Mexico in early April 2008 when she refused to do so.

[7] This matter has a long and complex procedural history, which was reviewed in detail in Interim Decision, 2013 HRTO 20, dated January 4, 2013. I will not repeat all of that history in this Decision. Suffice to say that originally there was an Application dated April 30, 2009, that was filed by CAW-Canada (or the "union") on behalf of 39 individuals, who were temporary foreign workers employed by the respondent company. By Interim Decision, 2009 HRTO 944, dated June 30, 2009, another individual was

added as an additional applicant, and by Interim Decision, 2010 HRTO 796, dated April 12, 2010, O.P.T. and M.P.T. were added as additional applicants.

[8] Criminal charges were laid against the personal respondent in relation to certain of the allegations raised by various applicants, including O.P.T. and M.P.T. The proceeding before this Tribunal was deferred pending the result of the criminal proceeding, which concluded on March 1, 2011. Thereafter, there were various preliminary and procedural issues that were addressed in a series of Interim Decisions and Case Assessment Directions.

[9] One of the issues addressed in Interim Decision, 2013 HRTO 20, dated January 4, 2013, was the scope of the present Applications following the resolution of certain issues by the parties. In that Interim Decision, I determined that the only allegations remaining in this case are the "sexual harassment" allegations, and that only nine applicants properly remained as part of this proceeding. During the course of the hearing before me, the disputes between the respondents and seven of these remaining applicants were resolved, and so no longer form part of this proceeding. This leaves O.P.T. and M.P.T. as the only remaining applicants about whom I need to make a determination as to whether their rights under the *Code* were breached by the respondents.

[10] The hearing before me took place in Windsor over the course of 16 days, on January 28 to 31, April 29 to 30, May 1, 22 and 23, June 17, July 15 to 17, and September 20, 2013, and June 18, 2014, with final submissions heard on October 10, 2014. Delays in completing the hearing in this matter were attributable to the very busy court schedule of counsel for the personal respondent and some unfortunate medical and family issues, none of which was reasonably avoidable.

[11] At the hearing, I heard evidence from O.P.T. and M.P.T., who were examined and cross-examined extensively over the course of many days. I also heard evidence from a third individual, M.G.C., who also was a migrant worker from Mexico and who

had worked at Presteve. These three witnesses testified with the assistance of a Spanish interpreter.

[12] I also heard evidence from a number of union officials. As these witnesses primarily had involvement with the migrant workers from Thailand who had worked at Presteve and had no involvement or interaction with O.P.T. or M.P.T., I have ultimately not found the evidence of these union officials to be of assistance to me in determining the allegations raised by O.P.T. and M.P.T.

[13] The intervenor called Dr. Kerry Preibisch as an expert witness to provide opinion evidence on the characteristics of temporary foreign worker programs in Canada and the vulnerability of migrant workers, particularly women. Given this Tribunal's decision in *Peart v. Ontario (Community Safety and Correctional Services)*, 2014 HRTO 611, which recognized Dr. Preibisch as an expert witness in relation to temporary foreign worker programs and migrant worker vulnerabilities, the respondents did not contest Dr. Preibisch's qualifications to testify as an expert witness in this proceeding, but took the position that little weight should be accorded to her opinion evidence as she had no direct involvement with the applicants or the events at issue.

[14] In my view, Dr. Preibisch meets the criteria to be qualified to testify as an expert witness in this proceeding as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. While she did not have any direct involvement with the applicants or events at issue, her evidence was relevant to the social context in which these events occurred and was also relevant to certain factors to be assessed in the context of my remedial order, including the particular vulnerability of the applicants as female temporary migrant workers. I also find that her evidence meets the criterion relating to necessity in assisting the trier of fact, given Dr. Preibisch's particular expertise in the study of temporary migrant workers, and especially women, in Ontario. For the reasons set out in the *Peart* decision and on the basis of the material before me in this proceeding, I further find that Dr. Preibisch is a properly qualified expert in light of her extensive academic background and record of publications in this area. Finally, there is no rule that would exclude her expert evidence. Further, having regard to the Supreme Court of Canada's recent decision in *White*

Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23, I find that Dr. Preibisch's evidence is sufficiently beneficial to the hearing process to warrant its admission despite the potential harm that may flow from the admission of her expert evidence, and she demonstrated before me her awareness of her duty to give fair, objective and non-partisan opinion evidence and her willingness to carry out that duty.

[15] The respondents called only one witness, an immigration officer who had interviewed O.P.T. on August 11, 2008. In particular, the personal respondent was not called to testify before me.

[16] The transcripts from the preliminary inquiry in the criminal proceeding against the personal respondent were filed with this Tribunal and were marked by me as exhibits to the hearing. On a conference call held with the parties on November 7, 2012, prior to the commencement of the hearing in this matter, I proposed that, without restricting the ability of any party to question any witness or elicit any relevant evidence, all parties be allowed to rely upon the evidence as set out in the transcript from the preliminary inquiry without needing to have that evidence repeated before me in oral testimony. This proposal was confirmed in a Case Assessment Direction dated November 14, 2012, in which I invited the parties to provide written submissions on this issue. As part of Interim Decision, 2013 HRTO 20, dated January 4, 2013, and having reviewed and considered the parties' submissions, I ordered that the transcript of evidence from the preliminary inquiry in the criminal proceeding would be accepted as sworn testimony before me and would be available for all parties to rely upon at the hearing. I made it clear that this order did not restrict the ability of any party to elicit further relevant evidence from any witness who appeared before me, and did not restrict the parties' ability to pursue relevant lines of cross-examination. At the hearing, I clarified for the parties that I would only rely upon evidence from the transcript in relation to witnesses who actually appeared and testified before me in the context of the human rights proceeding.

[17] One of the reasons for doing this was in an attempt to try to expedite the hearing, so that the parties would not have to take up time at the hearing unnecessarily by having witnesses repeat evidence or lines of cross-examination that already had been

given or pursued at the preliminary inquiry in relation to the same events that were at issue in the human rights proceeding. However, I am also mindful of the fact that the evidence elicited from the witnesses at the preliminary inquiry was given some five years earlier than when these same witnesses would be appearing before me at the hearing in the human rights proceeding, and at a time much closer to the events at issue. As a result, the evidence given at the preliminary inquiry may include details of these same events that witnesses were no longer able to recall by the time they testified in the human rights proceeding. Accordingly, in the course of this Decision, I will make reference to and rely upon some details of the events that the witnesses were able to recall at the time of the preliminary inquiry but were not able to recall by the time they gave their evidence before me, as well as addressing any inconsistencies in the witness evidence between what they testified to at the time of the preliminary inquiry and their testimony before me.

[18] I also received and marked voluminous documentation as exhibits to this proceeding, including further documentation that I ordered to be produced by the applicants in the course of the hearing at the request of the respondents. This further disclosure necessitated the recalling of several witnesses, including O.P.T. and M.P.T., for further cross-examination arising out of this disclosure.

Evidence of O.P.T.

[19] O.P.T. came to Canada from Mexico in early August 2007 as a temporary migrant worker under the federal government's temporary foreign worker program for low-skill occupations. She came with her younger sister, M.P.T., and eight other Mexican women to work at the respondent's fish processing plant in Wheatley. Upon their arrival, the ten women were taken by a Presteve employee from the Toronto airport to a house owned by the respondents in Leamington, where the women would live during their employment with Presteve. That evening, the women met the personal respondent and his wife, and were assigned bedrooms in the house. The applicant shared a bedroom with her sister and two other women.

[20] The next day, O.P.T. and the other women were taken into Leamington by the personal respondent to open bank accounts and to purchase work gear. The personal respondent also took from these women their passports, work permits and "green cards" (which I understand to be cards that enabled them to access health services in Canada). The personal respondent had the women sign a form permitting him to retain possession of these documents, which he advised was for safekeeping. As the document was in English, O.P.T. testified that she could not read what was on the paper she was signing.

[21] The personal respondent also set out certain rules for the women in terms of their housing, including that they needed to be in the house by 10 p.m. and that the door to the house would be locked as of that time, that they were not to be on the telephone or play music or have the television on after 10 p.m., that the lights had to be off by 10 p.m., and that guests were not allowed in the house.

[22] O.P.T. testified that about two or three weeks after she started working at Presteve, the personal respondent began to separate her from the group she had arrived with. She testified that he began to give her work tasks which involved her being in a different work location than the other women. In particular, at this time, the respondents were in the process of preparing a "bunkhouse" on their property in order to house a group of women from Thailand who were also coming to work at the plant as temporary foreign workers. The personal respondent assigned the applicant to assist the workers at the bunkhouse by sweeping, cleaning and picking up construction debris. She testified that she did this for about two weeks, until the bunkhouse was ready.

[23] O.P.T. testified that about one month after she arrived, the personal respondent started inviting her out to eat dinner with him alone. She testified that the personal respondent would call her after work and tell her that he was coming to the house to pick her up and take her out to eat. She testified that when she told him that she did not want to go out to eat with him, he would yell at her and tell her that if she did not go, he would send her back to Mexico. O.P.T. testified that she felt obligated to accept the personal respondent's invitations because she needed to work and did not want to be

sent back to Mexico. O.P.T. testified that these invitations to go out with the personal respondent occurred on many occasions, and the personal respondent would take her to restaurants in Tilbury and Chatham. O.P.T. testified that she told the personal respondent many times that she did not want to be out with him, and that she was sometimes crying when she was out with him. M.P.T. and M.G.C. also gave evidence that the personal respondent often would come to the house to pick up O.P.T. and take her out, and that when O.P.T. returned to the house, she would be upset and crying.

[24] With regard to O.P.T.'s evidence that the personal respondent threatened to send her back to Mexico if she did not do what he wanted, this evidence is consistent with the evidence of M.P.T. and M.G.C., who both testified that the personal respondent also made such threats to them. In addition, on one occasion, the personal respondent required the women from Mexico to vote on whether O.P.T. or another Mexican woman would be sent home. The vote was recorded on a sheet of paper that was entered into evidence before me. The women voted in O.P.T.'s favour, and the other Mexican woman was sent back to Mexico. None of the witnesses knew why the personal respondent required this vote to be held.

[25] The applicants submitted that this evidence about threats by the personal respondent to send migrant workers back to their home country is also consistent with Dr. Preibisch's evidence about the nature of foreign worker programs in Canada, which give employers the power to "repatriate" workers for any or no reason and for which there is no opportunity for any appeal or review. Dr. Preibisch testified that many migrant workers comply with such repatriation because they believe they have no choice or because not doing so means that they would have to continue to live in Canada with no employment and no accommodation and could lose their return airline ticket. Moreover, apart from the actual exercise of this power, Dr. Preibisch testified that the very threat of repatriation has the effect of causing migrant workers to do as they are told by their employers and not complain, given the significant consequences of being repatriated for workers and their families. While I do not doubt Dr. Preibisch's

evidence on this general point, it does not assist me in determining whether such threats were made by the personal respondent to the applicants in this particular case.

[26] O.P.T. testified that when she was in the car alone with the personal respondent, on two or three occasions he touched her legs with his right hand while he was driving. She testified that he touched both of her legs up to her vagina. O.P.T. testified that when she was being taken out to eat by the personal respondent, he would just start a conversation and then start touching her legs. She testified that he would move his hand along both of her legs up to the top of her leg and would touch her vagina. On such occasions, she testified that the personal respondent would do this over the top of her clothes. O.P.T. testified that she always told the personal respondent that she did not want him to do this. She testified that when the personal respondent would put his hand on her legs, she would tell him not to touch her and take his hand away, but the personal respondent would just smile and insist and continue to touch her. She testified that he would keep touching her, and she would keep saying no, and then after she had said no several times, the personal respondent would stop.

[27] O.P.T. testified that on one occasion when she was in the car alone with the personal respondent, he asked her to take her pants down. O.P.T. testified that she said no, but the personal respondent became very angry and started to yell and threatened to send her back to Mexico, so she felt that she had to do it even though she did not want to. She testified that she pulled her pants down but not her underwear, and then the personal respondent started to touch her bare legs with his hand and touched her vagina over the top of her underwear. She testified that the personal respondent was not saying anything while he was touching her, just smiling.

[28] On another occasion when she was in the car alone with the personal respondent, O.P.T. testified that the personal respondent pulled down the zipper of his pants and told her to touch his penis. She testified that she felt that she had to do this, because if she did not, the personal respondent could become more aggressive. She states that the personal respondent told her to put her hand inside his pants, and then pulled her hand so that it touched his penis. She testified that the personal respondent

had an erection when she touched his penis. She testified that the personal respondent did not say anything while she was doing this, and just continued driving. While she could not recall when this happened at the time she testified before me, O.P.T. had testified at the preliminary inquiry that this had happened in or about October or November 2007, when the personal respondent was taking her out to eat with him.

[29] She testified that she felt very bad when the personal respondent touched her, and would ask why he was doing this to her. She testified that the personal respondent would tell her that he loved her, and that she was different from other women. She testified that the personal respondent told her that he loved her on several occasions. She testified that the personal respondent offered to open two bank accounts for her children, and also offered to buy her a house or apartment in Mexico. She testified that she did not invite or accept these offers.

[30] O.P.T. testified that she was alone with the personal respondent in his private office at the plant on many occasions. She testified that the personal respondent would call her into his office every morning to ask her whether all of the other women in the house had come home the previous evening. She testified that the personal respondent would close the doors to his office when she was in there, and would lock the door leading to the processing plant. She testified that on several occasions in his office, the personal respondent put his hand inside her work coat and touched and squeezed her breasts over the top of her clothes. She testified that the personal respondent would not say anything when he was touching her breasts. She testified that she did not want him to do this. She testified that on one occasion, the personal respondent kissed her in his private office and told her that he loved her. She testified that the personal respondent touched her and then hugged her tightly and kissed her on her mouth. She testified that she did not want him to kiss her and had not given him consent to do so.

[31] O.P.T. testified that there also were occasions when she was alone with the personal respondent at the house in Leamington. She testified that during the course of the work day, when the other women sharing the house were also at work, the personal respondent would approach her and ask her to get the key to the house from the

Mexican woman who had been appointed to be in charge of the house. The personal respondent would tell her that men were coming to the house to fix things, like a leaking shower head, and that he wanted her to be there to make sure that the men did not steal anything. She testified that after she got the key, the personal respondent would drive her to the house. She testified that when they arrived, the men who were coming to fix things would not be there. She testified that she and the personal respondent would enter the house and be alone there.

[32] She testified that on one occasion, the personal respondent grabbed her hand while she was taking her boots off and pulled her to him. She testified that she recalls that she almost lost her balance when he did this. She testified that the personal respondent then hugged her with force and said “give me a little kiss”. She testified that she resisted and said no, but the personal respondent proceeded to kiss her on the mouth. She testified that she did not want or invite him to do this.

[33] On three other occasions when they were alone together at the house, she testified that the personal respondent asked her to suck his penis. She testified that on these occasions, the personal respondent said “just love me a little bit” and threatened to send her back to Mexico if she did not suck his penis. While she could not recall before me when this had occurred, O.P.T. had testified at the preliminary inquiry that this had occurred sometime in 2008 around March or April. She testified that this took place in the bathroom at the house in Leamington. She testified that the personal respondent would have an erection when he asked her to suck his penis. She testified that she did not want to do this, but did it because she needed her job and thought that the personal respondent would send her back to Mexico if she refused.

[34] On another three occasions when they were alone together in the house, O.P.T. testified that the personal respondent told her to pull her pants down, and then climbed on top of her and penetrated her with his penis. She testified that this occurred twice in the bedroom that she shared with her sister and two other women, and once in one of the other bedrooms. She testified that she did not want to do this, but was afraid that the personal respondent would send her back to Mexico if she refused. While she could not

recall when this occurred in her testimony before me, O.P.T. had testified at the preliminary inquiry that she believes that this occurred sometime in 2008 when it was still cold.

[35] On Sunday, May 4, 2008, O.P.T. was with a female friend watching a soccer game on television at a bar. O.P.T. was supposed to be at work that day, but had gone with a friend to the hospital the previous day and testified that she had arrived back to the house in Leamington too late and had not been allowed in.

[36] She testified that her cellphone was ringing and she could see that it was the personal respondent trying to call her. She testified that she did not want to answer her phone because if she did, she believed that the personal respondent would come and get her. She testified that when she finally answered her phone, the personal respondent asked where she was and said that he would be there in five minutes to pick her up. She testified that when she got into his car, the personal respondent began yelling at her about why she was not answering her phone, and told her to give her phone to him. O.P.T. testified that she did not want to do so, so she put the phone in between her legs. She testified that while he was still driving the car, the personal respondent tried unsuccessfully to take the phone from her and to get the phone out from between her legs. She testified that at one point, the personal respondent took both hands off the steering wheel and tried to pry her legs open with both hands. She testified that as a result, the car swerved across the road and almost collided with an oncoming truck.

[37] She testified that the personal respondent then pulled the car over to the side of the road, got out, and came around to her side and told her to unlock the car door. O.P.T. testified that she complied, but before she did so, she slid her phone under the seat. She testified that once the car door was open, the personal respondent grabbed her purse and emptied its contents looking for her phone. She testified that he then grabbed her by the wrists and pulled her out of the car. At this point, O.P.T.'s friend drove by, stopped her car and intervened to tell the personal respondent to stop. O.P.T. and her friend then went to the Leamington police and assault charges were laid against

the personal respondent. O.P.T. testified that she told her friend that she did not want to go to the police because she was afraid of the personal respondent, but her friend said that she would report the incident herself if O.P.T. did not come with her. At trial, the personal respondent was found guilty of assault but was given an absolute discharge.

[38] O.P.T. did not return to work at Presteve after the May 4, 2008 incident. Shortly afterwards, O.P.T. testified that she went to the Mexican consulate in Leamington to obtain assistance to get the personal respondent to pay her outstanding wages. She testified that she did receive her final pay for the last 15 days that she had worked, but did not receive the one month's wages that she says was withheld by the respondents when she first started working.

[39] On May 19, 2008, O.P.T.'s birthday, O.P.T. returned to the house in Leamington for a visit. While there, she testified that she was given a gold necklace with a crucifix. She testified that she initially thought that it was a present from the other women, but was then told that it was a gift from the personal respondent. O.P.T. testified that she threw the necklace away after leaving the house.

[40] During the period of time immediately after May 4, 2008, O.P.T. lived with the same female friend she had been with on May 4, 2008. At some point, her father, who was a seasonal agricultural worker in the area, contacted her by phone and took her to meet with a friend of his. This friend took O.P.T. to Windsor to the Windsor-Essex Bilingual Legal Clinic ("WEBLC"), where she met with one of the clinic's lawyers. From the documents before me, it appears that this meeting may have taken place on June 4, 2008. The following day, on June 5, 2008, a WEBLC lawyer sent a letter to the personal respondent demanding the immediate return to O.P.T. of her passport, work permit, health card, return airline ticket, personal photographs, and the wages that had been withheld for the first month of O.P.T.'s employment with Presteve. Ultimately, with the assistance of the police, O.P.T. was able to obtain the return of her passport, but not her return ticket or the wages that had been withheld.

[41] O.P.T. returned to Mexico on August 27, 2008 to care for her children. For about two months prior to her return to Mexico, the applicant worked as a waitress and dancer at a strip club in Windsor. At the time, her work permit only permitted her to work at Presteve. WEBLC assisted O.P.T. in obtaining a temporary residency permit which was issued on August 11, 2008 as a result of a meeting with an immigration officer. This permit was valid until February 2009 and allowed O.P.T. to leave and return to Canada.

[42] Prior to returning to Mexico, O.P.T. contacted the personal respondent by phone to once again request her return airline ticket and unpaid wages. O.P.T. testified that the personal respondent wanted her to come to Leamington to meet with him, but she arranged to meet him in a public place at a mall in Windsor and went to the mall together with her boyfriend. O.P.T. testified that at this meeting, the personal respondent gave her the return airline ticket and the wages that had been withheld from her. She testified that the personal respondent also gave her a letter, which she could use if she came back to Canada. This letter is dated August 25, 2008 and is in evidence before me. It is an offer to O.P.T. of a permanent position at Presteve as a fish filleter and enabled her to start in this position at any time she desired. It states that Presteve is confident that O.P.T. will be able to make a significant contribution to the success of the company, that they look forward to working with her, and is signed by the plant manager.

[43] After she returned to Mexico, O.P.T. testified that she received three telephone calls from the personal respondent. She testified that the first phone call was approximately one week after her return. This call was received by O.P.T.'s brother, as O.P.T. was out at the time. She testified that the personal respondent called again the next morning. She testified that the personal respondent told her that he was going to be in Mexico on business, and that he wanted to come to O.P.T.'s house and see her children. After some prompting on the basis of her WEBLC lawyer's notes, O.P.T. testified that she also recalled the personal respondent telling her that he loved her and saying "why don't you believe everything I told you?" The third telephone call from the

personal respondent was received by O.P.T.'s mother, and O.P.T. did not speak with him at that time.

[44] O.P.T. returned to Canada with her children on November 24, 2008. Following her return, O.P.T. was contacted by a friend who told her that a police detective was trying to get in touch with O.P.T. O.P.T. met with the police detective on December 18, 2008 and gave a statement through an interpreter. O.P.T. testified that this was the first time that she disclosed her allegations that she had been sexually assaulted by the personal respondent. She testified that she was afraid to talk about what the personal respondent had done to her because she was very confused and very scared. She testified that she did so at that time, because the police detective told O.P.T. that she wanted to help her and that O.P.T. could trust the detective. Notes from the WEBLC file indicate that at a meeting sometime in December 2008, O.P.T. also disclosed to WEBLC counsel that the personal respondent would force her to have sex with him, touch her legs and put her hand on his penis, although O.P.T. did not recall telling this to WEBLC counsel at the time she testified before me.

[45] Criminal charges of sexual assault relating to O.P.T. were laid by the police against the personal respondent in December 2008. A preliminary inquiry into these charges and sexual assault charges laid against the personal respondent in relation to a number of other female temporary foreign workers who had worked at Presteve was held over 20 days during the period from September 2009 to April 2010. Ultimately, on March 1, 2011, the personal respondent pled guilty to simple assault and received a conditional discharge and three months' probation. As part of the facts agreed to for this plea, the personal respondent admitted that while they were in his car, he touched both O.P.T.'s legs over clothing. Defence counsel for the personal respondent stated at sentencing that there was nothing sexual in nature about any of the touching upon which the guilty plea was based. While it was submitted before me that this was agreed to by the sentencing judge, this is not evident from the transcript of sentencing before me. Rather, the sentencing judge sentenced the personal respondent on the basis of the admissions as agreed to between the Crown and the personal respondent.

[46] WEBLC closed its file in relation to O.P.T. in January 2009, after being advised that O.P.T. had retained private counsel to assist her with her claim for refugee status that had been made on December 11, 2008.

[47] On June 18, 2009, O.P.T. and her sister M.P.T. attended at the WEBLC offices to sign forms relating to a potential human rights application that had been provided to WEBLC by the CAW-Canada office. On July 20, 2009, the CAW-Canada filed a Request for Order seeking to amend an existing human rights application to add O.P.T. and M.P.T. as applicants. This request was granted on consent by Interim Decision dated April 12, 2010.

Evidence of M.P.T.

[48] M.P.T. also came to Canada in early August 2007 with her sister and eight other Mexican women to work as temporary migrant workers at Presteve.

[49] M.P.T. testified that on her first day at work, the personal respondent came up behind her in the hallway during a break and slapped her on her buttocks. She testified that other workers were around when this occurred. She testified that she was walking down the hallway and stopped to wash her hands, and then the personal respondent slapped her on her left buttock with one hand. She testified that she was scared and in shock that he had done this, and turned around and looked at the personal respondent, who started laughing. M.P.T. testified that she was afraid to say anything to the personal respondent about this incident, because he might say that he would send her back to Mexico. She testified that the personal respondent previously had threatened to send them back to Mexico if they broke the rules.

[50] M.P.T. testified that the personal respondent also touched her breast twice when she was alone with him in his private office at the plant. While she did not recall when this had happened when she testified before me, at the preliminary inquiry in the criminal proceeding M.P.T. had estimated that this first occasion may have been about two months after the personal respondent had slapped her on the buttock. She testified

that the personal respondent sent someone to get her because of some issue with her sister, O.P.T. She testified that, after she arrived in the personal respondent's office, he was talking to her and then he got up from behind his desk, came near to her, and held her breast on top of her clothing while she was standing. She does not remember which breast he touched or with what hand, but testified that he touched her breast with his palm open. She testified that she took his hand away by grabbing his wrist and pulling it away. She testified that the personal respondent had his hand on her breast for a few seconds before she took it away. She testified that the personal respondent did not say anything when he touched her breast. She testified that she told the personal respondent that he should respect her because she respected him. She testified that the personal respondent continued talking about her sister, and then told her to leave his office. She testified that she did not give the personal respondent consent to touch her breast, and that the incident made her feel very bad because it was not right. She also testified that the incident made her feel angry and humiliated.

[51] While she could not recall when the second incident had occurred when she testified before me, M.P.T. had testified at the preliminary inquiry that the second incident in the personal respondent's office happened about three months later. She testified that once again she was called to the personal respondent's office to talk about some issue with her sister. She testified that they were having a conversation and while talking, the personal respondent came over and touched her breast over her clothing in the same manner as he had done the first time. She testified that he kept his hand on her breast for a few seconds before she took his hand away. Once again, she does not recall which breast he touched or with what hand. M.P.T. testified that she was shocked and asked him, "what's happening, what's going on?", as she took his hand away. She testified that the personal respondent did not respond to what she had said, and simply continued talking about their previous conversation. M.P.T. testified that she felt very bad as a result of this incident, and also felt angry and humiliated. She testified that she was shaking because of the anger and fear that she felt.

[52] M.P.T. testified that the personal respondent asked her to have sex with him and touched her leg on two occasions when he was taking M.P.T. to see the doctor. She testified that on the first occasion, she needed to go see the doctor because she was getting pimples on her face, which were very itchy. She testified that she asked the personal respondent to make an appointment for her to see the doctor about this, and he did. She testified that she did this because the personal respondent had said that nobody else but him could take her or the other Mexican women to see the doctor.

[53] She testified that the personal respondent drove her to the doctor's office, and she sat in the front passenger seat beside him. She testified that on the way to the doctor's appointment, the personal respondent said that he knew how to get rid of her pimples, that he had medication for this if she wanted it, and that it would make her pimples go away. She testified that the personal respondent then said that if she had sexual relations with him, her pimples would go away. She testified that the personal respondent asked if she was having sexual relations with her boyfriend, and if not, she could have sex with him and that would be good.

[54] She testified that on the way back from the doctor's appointment, the personal respondent insisted that she have sexual relations with him, and touched her left leg with his right hand. She testified that he placed his hand across her thigh about four inches above her knee and kept it there for about one minute. She testified that she removed the personal respondent's hand from her leg, while the personal respondent continued to say that having sex with him would feel good. M.P.T. testified that she told the personal respondent no, to which he replied that she should think about it. She testified that as she got out of the car once they arrived at the house in Leamington, the personal respondent said that she should think about having sex with him since it had been a long time since she had arrived in Canada and she had not had any sexual relations in that time. M.P.T. testified that she told the personal respondent that he should respect her. M.P.T. testified that she felt very bad as a result of this incident, and felt fear mixed with anger. She testified that she felt humiliated that she had to put up

with this in order to work. M.P.T. does not recall when this incident occurred in relation to the two incidents in the personal respondent's office.

[55] The second occasion on which the personal respondent took M.P.T. to the doctor occurred on November 19, 2007. M.P.T. recalls this because it was her birthday that day. Prior to the date of the appointment, M.P.T. testified that she was experiencing an inflammation in her stomach. She testified that she was taking medication, but the problem persisted. She testified that she went to the personal respondent's office to ask him to take her to the doctor, and the personal respondent said that if she had sex with him, all of her symptoms would disappear. She testified that he said that it really was not necessary for her to go to the doctor because he had the remedy for her ailment, which was having sexual relations with him. She testified that the personal respondent said that if she still wanted to go see the doctor, he would take her. She testified that she told the personal respondent that what he was saying was not right, and again told him that he should respect her because she respected him.

[56] She testified that she asked the personal respondent to take her to see the doctor again, despite what had occurred the first time, because the personal respondent had said that no one else but him could take the foreign workers to the doctor and because she felt very bad as a result of the stomach inflammation.

[57] M.P.T. testified that on the way to see the doctor, the personal respondent once again said that a lack of sex was causing her stomach inflammation and that he could do her the favour of giving her sex. She testified that on the way back after seeing the doctor, the personal respondent once again talked about having sex with her. She testified that he said that, if she wanted, he could have sexual relations with her if her boyfriend did not want to, to which she responded no. She testified that the personal respondent then touched her leg with his right hand, with an open palm across her thigh about six inches above her knee, while he continued saying that she should have sexual relations with him. She testified that she moved to the side towards the car door, and moved his hand off her leg and to the side. She testified that she once again told the personal respondent no, and said, "how could I have sexual relations with you?"

She testified that the personal respondent responded by saying “it’s nice” and later telling her that she was nice. M.P.T. testified that she remained silent for the remainder of the car ride back, while the personal respondent continued talking. She testified that when she was getting out of the car, the personal respondent again told her to think about it. M.P.T. testified that this incident occurred after the two incidents in the office, although she does not recall how long.

[58] M.P.T. was sent back to Mexico by the personal respondent on April 2, 2008, following an incident that occurred in March 2008. O.P.T.’s evidence is that on this occasion in March 2008, the personal respondent had invited her out for dinner, but she did not want to go, so she left the house in Leamington where she was staying with the other Mexican female workers before the personal respondent arrived at the house to pick her up. M.P.T. testified that the personal respondent arrived at the house to look for O.P.T. as M.P.T. was heading out for coffee with a friend. She testified that the personal respondent asked her whether O.P.T. was there, to which M.P.T. replied that she was not. She testified that the personal respondent then asked where O.P.T. had gone, and M.P.T. said that she did not know. M.P.T. testified that the personal respondent then said that M.P.T. could not go out, because it was too late and she had no right to go out. M.P.T. replied that it was not yet 10:00 p.m. and she had time to go out for a coffee. She testified that the personal respondent then told her that if she put one foot outside the house, he would send her back to Mexico. When M.P.T. proceeded to go out for coffee, she testified that the personal respondent told her not to come back to the house because she had no right to come back to the house. She testified that the personal respondent was shouting and screaming at her, and slammed the door when he left the house.

[59] M.P.T. testified that when she came back from having coffee, her co-workers did not want to speak with her, but one of them opened the door for her. She testified that she asked this co-worker what orders the personal respondent had given, to which the co-worker replied that she did not know anything. M.P.T. testified that she then went into the house and stayed there. M.P.T. testified that she was told by the woman in

charge of the house to apologize to the personal respondent. She also testified that O.P.T. told her that the personal respondent had said that he did not want to speak with M.P.T. because she had been disrespectful. M.P.T. states that she was told by O.P.T. that, if she wanted to remain in Canada, she needed to go and ask the personal respondent to allow her to stay and apologize to him. While this is hearsay evidence on the part of M.P.T., O.P.T. was able to testify directly that the personal respondent told her that M.P.T. had to go because she was not respecting the rules, which supports M.P.T.'s evidence on this point.

[60] O.P.T.'s evidence is that the personal respondent also told her that M.P.T. did not love O.P.T. and that M.P.T. was "the devil". M.P.T. testified that O.P.T. told her what the personal respondent had said. M.P.T. testified that she went to the personal respondent's office at the plant to ask him why he had told things to her sister that were not true. She testified that she waited for the personal respondent to arrive in his office. When the personal respondent arrived in his office, she testified that he told M.P.T. to get out of his office and that he did not want to see her, and he grabbed M.P.T.'s arms above the elbows and pushed her towards the door to the plant. She testified that the push moved her about three steps backward, and she asked the personal respondent to let her go and moved her arms upward and outward to get free. She testified that the plant secretary walked in and asked if everything was alright and the personal respondent said yes, and then the secretary left and closed the door. She testified that the personal respondent threatened to call the police, to which she responded that he should call the police and she would tell them what he had done to her. M.P.T. testified that the personal respondent then said that they should sit down and talk like two civilized people, that there was no reason to push or yell, and no need for the police. She testified that they then sat down and talked for about 20 minutes about the issues between herself and her sister.

[61] A few days after this meeting, M.P.T. testified that she was told by her sister that the personal respondent had said that M.P.T. would have to go back to Mexico. She testified that on the day she left, which was April 2, 2008, the personal respondent gave

her the return airline ticket to go back. On April 2, 2008, after she left Presteve, M.P.T. testified that she went to the Mexican consul in Leamington to tell him about what the personal respondent had done and why she had been fired. She testified that she told the Mexican consul that the personal respondent had touched her buttock, her breasts and her leg. She testified that the Mexican consul told her that he could do absolutely nothing, and that the best option was for her to go back to Mexico because he could not give her any help. She testified that the Mexican consul said that he did not want any problems with the personal respondent, and did not want anything to do with him.

[62] M.P.T. returned to Mexico on April 2, 2008. On February 12, 2009, M.P.T. was contacted by phone in Mexico by a police detective from Windsor and asked about her experiences with the personal respondent. M.P.T. told the police detective about the various incidents of physical touching that she described in her evidence before me and at the preliminary inquiry in the criminal proceeding. Criminal charges were laid against the personal respondent in February 2009 arising out of the information provided to the police by M.P.T.

[63] On February 18, 2009, M.P.T. returned to Canada with two of her brothers and went to Windsor and stayed with her sister O.P.T. for a period of time. M.P.T. filed a claim for refugee protection in Canada on June 21, 2009. M.P.T. was being assisted at this time with her refugee claim by an individual named “Carlos”, and was not represented by the WEBLC in relation to her immigration status until June 2010. By decision dated September 8, 2010, M.P.T.’s claim for refugee status was denied.

[64] On June 18, 2009, M.P.T. accompanied her sister O.P.T. to the WEBLC to sign forms for her human rights application which had been provided to the clinic by the CAW-Canada. M.P.T. testified that she first heard about her ability to file a human rights application through a lawyer at the WEBLC, which she believes was around the time that she filed her refugee claim. As stated above, on July 20, 2009, the CAW-Canada filed a Request for Order seeking to amend an existing human rights application to add M.P.T. and O.P.T. as applicants. This request was granted on consent by Interim Decision dated April 12, 2010.

[65] As noted above, on March 1, 2011, the personal respondent pled guilty to simple assault on M.P.T. and others and received a conditional discharge and three months' probation. As part of the facts agreed to for this plea, the personal respondent admitted that on one occasion in his office he touched M.P.T. in the chest and that in the car on two trips to the doctor's office he touched M.P.T.'s leg above the knee, which only lasted a couple of seconds and then M.P.T. took his hand away. Defence counsel for the personal respondent stated at sentencing that there was nothing sexual in nature about any of the touching upon which the guilty plea was based.

Delay issue

[66] An issue was raised by the respondents that the Applications should be dismissed for delay. By Interim Decision, 2013 HRTO 20, dated January 4, 2013, I indicated that I would not decide this as a preliminary issue, but rather would hear evidence and argument on the delay issue as part of the hearing on the merits: see paras. 56-57.

[67] Section 34 of the *Code* states, in its relevant parts:

> 34.(1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,
>
> (a) within one year after the incidents to which the application relates; or
>
> (b) if there was series of incidents, within one year after the last incident in the series.
>
> (2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

[68] The onus is on an applicant under s. 34(2) of the *Code* to satisfy this Tribunal that the delay in filing an application was incurred in good faith. This requires that the applicant provide some reasonable explanation for the delay: *Imrie-Howlett v. Peel*

District School Board, 2009 HRTO 1339. In *Miller v. Prudential Lifestyles Real Estate*, 2009 HRTO 1241, this Tribunal held that an applicant is required to show something more than simply an absence of bad faith.

[69] The Tribunal has consistently found that ignorance of one's rights under the *Code* and a failure to make inquiries about one's rights may not be sufficient to establish that delay was incurred in good faith. An oft-quoted passage from *Lafleur v. Kimberley Scott*, 2009 HRTO 1141, states:

> In another context, the Ontario courts have had occasion to interpret the phrase "delay that been incurred in good faith." To establish that delay in pursuing one's rights has been incurred in good faith, it must be shown that the applicant acted honestly and with no ulterior motive. (*Hart v. Hart* (1990), 27 R.F.L. (3D) 419 (Ont. U.F.C.), cited in *Scherer v. Scherer* 2002 CanLII 44920 (ON CA), (2002) 59 OR (3d) 393 (O.C.A.)). Delay has been found not to have been incurred in good faith where it was due to wilful blindness to the need to make inquiries about one's rights: *Webster v Webster Estate*, [2006] OJ No. 2749 (ON S.C.). The courts have held that "failure to act in ignorance of one's rights may, in some circumstances, amount to "good faith". However, … it is not enough for a party who must establish good faith to say that he or she was ignorant of their rights. They must also establish that they had no reason to make enquiries about those rights. (*Busch v. Amos*, [1994] OJ No. 2975 (Ct. J. (Gen. Div.), cited in *Scherer, supra*).

[70] In my view, the Applications by O.P.T. and M.P.T. were "made" to the Tribunal on July 20, 2009, when a request for leave to amend an existing application was made to add these two individuals as parties to the existing application, on notice to the respondents. The subsequent time period until April 13, 2010, when the amendment to add O.P.T. and M.P.T. as applicants to this proceeding was granted on consent, is attributable to the complexity of this proceeding, which at that time involved some 42 applicants, and the various preliminary issues that needed to be addressed, and is not attributable to these applicants.

[71] With regard to whether O.P.T.'s allegations ought to be dismissed on account of delay, the first issue to be determined is whether O.P.T.'s human rights allegations were

brought to the Tribunal within a year of the "last incident in a series of incidents" to which her Application relates.

[72] Specifically, O.P.T. argues that the personal respondent's phone calls to her in Mexico, which occurred sometime in late August or early September 2008, constitute an alleged incident of discrimination within the one year period preceding the making of her Application in July 2009. I agree.

[73] As I will discuss in more detail below, in the context of the other allegations of sexual solicitations and advances, sexual harassment and a sexually poisoned work environment against the personal respondent that arose during the period of O.P.T.'s employment with Presteve, the phone call by the personal respondent to O.P.T. in Mexico in which the personal respondent said that he wanted to come to O.P.T.'s house in Mexico and see her children and told her that he loved her, can properly be regarded as an allegation of a sexual solicitation or advance in violation of s. 7(3)(a) of the *Code*. That section provides that every person has the right to be free from sexual solicitation or advance by a person in a position to confer, grant or deny a benefit, where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

[74] In this case, the applicant alleges that, in telling O.P.T. in late August or early September 2008 that he loved her and wanted to come to see her in Mexico, the personal respondent, as a person in a position to confer, grant or deny a benefit to O.P.T., was sexually soliciting or making a sexual advance to O.P.T. that he knew or ought reasonably to have known was unwelcome. O.P.T. alleges that she repeatedly had told the personal respondent that his solicitations and advances were unwelcome, such that the personal respondent knew or ought reasonably to have known that his request to visit O.P.T. and her children in Mexico and his expression of love to O.P.T. was unwelcome. She alleges that the personal respondent is also properly regarded as a person who was in a position to confer, grant or deny a benefit or advancement to O.P.T. at the time he called her in late August or early September 2008. Even though O.P.T. was no longer working for Presteve at the time of the phone call, the

unchallenged and uncontradicted evidence is that the personal respondent delivered a letter to O.P.T. dated August 25, 2008 making an open-ended offer of permanent employment with Presteve that O.P.T. could exercise whenever she chose. This was a benefit that the personal respondent, as the owner and principal of Presteve, could rescind or deny at any time. Accordingly, I find that the personal respondent's phone call to the applicant in Mexico in late August or early September 2008 was an incident of alleged discrimination within the one year period prior to O.P.T.'s application being made on July 20, 2009.

[75] I further find that O.P.T.'s allegations of sexual solicitations and advances, sexual harassment and a sexually poisoned work environment against the personal respondent that arose during the period of O.P.T.'s employment with Presteve form part of a "series" of incidents that extends to and includes the telephone call to her in Mexico.

[76] When assessing whether allegations relate to a "series of incidents", this Tribunal will generally consider the nature of the events and whether they may reasonably be viewed as a pattern of conduct or are comprised of incidents relating to discrete and separate issues without some connection or nexus: see, for example, *Baisa v. Skills for Change*, 2010 HRTO 1621. In *Pakarian v. Chen*, 2010 HRTO 457, the Tribunal defined the word "series" as "a number of things or events of the same class coming one after another in spatial or temporal succession". This Tribunal has held that a "series of incidents" may be considered to exist where the incidents share a common theme, similar parties and/or circumstances: see *Twyne v. Dominion Colour Corporation*, 2013 HRTO 1769.

[77] The respondents argued that the allegation arising from the telephone call to O.P.T. in Mexico cannot reasonably be regarded as forming part of a "series of incidents" that encompasses the allegations of sexual touching. However, applying the criteria developed in this Tribunal's case law, there is no question that the incidents of harassment and discrimination that occurred during the course of O.P.T.'s employment with Presteve and the telephone call to O.P.T. in Mexico involved the same parties. I further find that they shared a common theme and can reasonably be viewed as a

pattern of conduct. The overarching theme or pattern of the personal respondent's conduct towards O.P.T. relates to unwanted and unwelcome sexual attention and actions towards her by the personal respondent, together with misguided expressions of his professed love for her. Accordingly, I find that O.P.T.'s allegations in their entirety represent a series of incidents that extends to and includes a last allegation that is within one year of when she made her application to the Tribunal. Consequently, no issue of delay arises in relation to O.P.T.'s application.

[78] In any event, even if I had found that the last incident to which O.P.T.'s Application relates was on May 4, 2008, as asserted by the respondents, I would have found that the delay by O.P.T. in making her application to this Tribunal in relation to incidents of alleged harassment or discrimination that occurred more than one year prior to July 20, 2009 was incurred by O.P.T. in good faith within the meaning of s. 34(2) of the *Code*. O.P.T.'s evidence is that when she arrived in Canada, she had no awareness and no one informed her of her rights under the *Code* or her employment rights. While she did speak to a lawyer at the WEBLC in June 2008 to assist her with her immigration status and to claim the documents and wages withheld by the personal respondent and while the WEBLC continued to provide legal assistance to O.P.T. in respect of at least her immigration status until January 2009, O.P.T.'s evidence is that at no time was she advised of her ability to make an application against the respondents arising out of a breach of her rights under the *Code*.

[79] In the hearing before me, O.P.T. waived privilege over her communications with the WEBLC, which resulted in an order requiring disclosure by the WEBLC of all documents pertaining to its communications with and representation of O.P.T., including handwritten notes of meetings and discussions with O.P.T. The respondents could point to nowhere in this documentation where O.P.T. had been advised by the WEBLC of her ability to file a human rights application prior to June 18, 2009, when she and her sister came in to the clinic to sign forms provided by the CAW to proceed with such an application.

[80] The respondents take the position that I should draw an adverse inference out of the failure by O.P.T. to call WEBLC counsel as a witness to testify in this proceeding. I decline to do so. WEBLC counsel is not a party to this proceeding but merely a witness. As has often been observed, there is no property in a witness, and any party to this proceeding could have called WEBLC counsel to testify if they so chose, given that privilege had been waived. Further, I was not pointed to anything in the significant volume of documentation produced by the WEBLC to contradict O.P.T.'s testimony that, although she clearly told a lawyer that she had been sexually harassed and assaulted by her employer, she was not advised of her ability to file a human rights application prior to June 18, 2009. Thereafter, I find that the CAW acted promptly to file a request to amend the existing application to add O.P.T. as an applicant.

[81] I will address below the respondents' submissions regarding O.P.T.'s failure to disclose the alleged sexual assaults to anyone at an earlier point in time. However, in the context of the delay issue, the fact is that O.P.T. disclosed the alleged sexual assaults by the personal respondent to the police on December 18, 2008 and also disclosed that she had been sexually assaulted to WEBLC counsel sometime afterward in December 2008. At this time, O.P.T. would have been well within the one-year time period for making a human rights application. Yet in the transcript of her police interview and in the notes of her meeting with WEBLC counsel, there is nothing to contradict O.P.T.'s evidence that she was not advised of any ability to file a human rights application or initiate any kind of civil proceeding to seek compensation for what had been done to her.

[82] In my view, it is hard to imagine what more O.P.T. reasonably could have been expected to do in these circumstances. Well within one year of the last alleged *Code* infringement, O.P.T. told not only the police but also a lawyer she went to see for immigration advice that she had been forced to have sex with her employer, the personal respondent, or else he would fire her and send her back to Mexico. O.P.T. was not advised that she could take any kind of legal action against the respondents to vindicate her rights or encouraged to seek legal advice with respect to that issue. She

was a migrant from Mexico, unfamiliar with Canadian human rights or employment law. She did not speak English. In these circumstances, in my view, it cannot reasonably be concluded that O.P.T. acted in wilful blindness of her rights. While this Tribunal has held that mere ignorance of one's rights and a failure to make inquiries about one's rights may not be sufficient to establish good faith, it is hard for me to conceive of what more could be expected of a migrant from Mexico who does not speak English than to share the story of her experiences with persons in positions of authority like the police and WEBLC counsel. An individual in such circumstances, in my view, cannot reasonably be expected to ask specifically about the potential for a human rights claim or a civil claim for compensation when she has no familiarity with Canadian law.

[83] The Tribunal's case law has addressed a number of situations where an applicant has alleged that a human rights application was not filed in a timely manner on the basis that legal counsel had not informed the applicant of her or his ability to pursue her or his rights under the *Code*. While, in the specific circumstances of each of these cases, the Tribunal found that this did not amount to "good faith" within the meaning of the *Code*, in my view the facts of the instant case are readily distinguishable.

[84] In *Biega v. Management Research & Solutions*, 2011 HRTO 13, reconsideration denied, 2012 HRTO 181, the applicant retained a lawyer even before the last incident of discrimination in January 2008. Subsequently he launched a civil proceeding for wrongful dismissal. After filing a human rights application in December 2009, the applicant argued that the delay was incurred in good faith because he had no knowledge of anti-discrimination legislation until his lawyer mentioned it to him in September 2009. In rejecting the applicant's argument, the Tribunal stated that it did not accept as credible the applicant's claim that he did not have knowledge of the *Code* or of the possibility of legal remedies for discrimination until September 2009, nearly one year after he retained counsel.

[85] In *Krajisnik v. Linamar*, 2011 HRTO 143, the Tribunal found that the last incident of alleged discrimination had occurred on May 30, 2002, and that the applicant had waited until November 2009, over seven years later, to file his human rights application.

After the application was dismissed for delay, the applicant sought reconsideration on the basis that he had not been informed of his right to pursue a human rights application until sometime in 2009. In 2011 HRTO 460, the Tribunal held that this should have been raised at an earlier stage in the proceeding and was not an appropriate basis to support overturning the Tribunal's original decision. The Tribunal also noted that in the period between 2002 and 2009, the applicant had been involved in multiple legal proceedings relating to the pursuit of his rights under the *Workplace Safety and Insurance Act* ("*WSIA*"). While it was alleged on reconsideration that the applicant's lack of facility in English hampered his ability to learn about his rights under the *Code*, the Tribunal rejected this contention on the basis that the applicant was manifestly able to pursue his legal rights before the Workplace Safety and Insurance Board and the Workplace Safety and Insurance Appeals Tribunal.

[86] In *Murray v. Craigwood Youth Services*, 2011 HRTO 677, the applicant had consulted with and eventually retained legal counsel to address the termination of her employment. Her lawyer initiated an action for wrongful dismissal, with no indication that either the applicant or counsel turned their minds to possible remedies under the *Code*. After the civil action was dismissed the applicant filed a human rights application, some 22 months after the termination. In finding that the explanation for the delay was not in good faith, the Tribunal stated that, while the applicant's legal counsel may have failed to inform her regarding her rights pursuant to the *Code*, that by itself does not constitute a satisfactory explanation for why she could not have filed her Application in a timely manner. The Tribunal also noted that the applicant's own evidence was that she had been informed of her ability to file a human rights application in June 2009, but did not do so until September 2009, and that the applicant had not provided a reasonable explanation for this further delay.

[87] In *McGhie v. Bell Canada*, 2011 HRTO 1197, the last incident of alleged discrimination was the termination of the applicant's employment in February 2009. The applicant was assisted by his union's lawyer in filing a grievance under the collective agreement governing his workplace. The human rights application was filed on

September 15, 2010. The applicant argued that the Tribunal should allow the application to proceed because his union lawyer only made him aware of his right to seek redress under the *Code* well after the one-year limitation period had passed. In dismissing the Application, the Tribunal stated that while ignorance of anti-discrimination legalisation may in some circumstances amount to good faith, the applicant had failed to establish that he had no reason to make inquiries about his rights under the *Code*.

[88] In my view, the common feature of these cases is that the applicants all were actively consulting with legal counsel for the purpose of pursuing rights directly related to the employment issues that were the foundation of their human rights applications, but were pursuing these rights in different legal fora: in *Biega* and *Murray*, through civil actions in the courts; in *Krajisnik*, under the *WSIA*; and in *McGhie*, through the grievance arbitration process. In this context, they had sought and were receiving legal advice regarding their employment issues and were pursuing claims arising out of their employment issues, but were not advised and failed to make inquiries about their rights under the *Code*.

[89] In contrast, in the instant case, the uncontradicted evidence before me is that O.P.T. was never advised of her employment rights or her rights under the *Code* until shortly before she made her Application. While she had retained legal counsel from the WEBLC, this was primarily for the purpose of addressing immigration issues. Nonetheless, by at least December 2008, O.P.T. had made both the police and her legal counsel aware of the allegations that form the basis of her human rights application, but was never advised of her rights under the *Code* or her ability to pursue these rights.

[90] Further, in my view, the fact that O.P.T. was a temporary migrant worker from Mexico with very limited facility in the English language and no knowledge of the legal processes available in this province to pursue employment or human rights issues presented real and significant barriers to her ability to inquire about her *Code* rights that are not present in other cases decided by this Tribunal. These factors, in my view, relate to the protected *Code* characteristics of ancestry and place of origin and are directly

implicated in O.P.T.'s lack of knowledge of her *Code* rights and the barriers to her ability to make inquiries about these rights. This Tribunal has recognized that "good faith" may be found where a protected *Code* characteristic is closely connected to the reasons for the delay, as I find that it is in the instant case: see *Lutz v. Toronto (City)*, 2010 HRTO 769; *Kelly v. CultureLink Settlement Services*, 2010 HRTO 977. In my view, the close connection of *Code* characteristics to the explanation for the delay constitutes an example of "exceptional circumstances" that can excuse an applicant's ignorance of her *Code* rights and any failure to make specific inquiries about those rights: see *Lutz v. Toronto (City)*, above; *Hunter v. Vermeer*, 2010 HRTO 669. In my view, having regard to O.P.T.'s personal circumstances and the failure of anyone to inform her of her right to file a human rights complaint or seek compensation arising out of sexual assaults that she had reported to the police and her lawyer, I find that, if there was any delay by O.P.T. in making her Application against the respondents, any such delay was incurred in good faith within the meaning of s. 34(2) of the *Code*.

[91] With regard to M.P.T., there is no issue that her application was made to this Tribunal more than one year after the last alleged incident of discrimination to which her Application relates. While the respondents took the position that the last alleged incident of discrimination in relation to M.P.T. occurred on November 19, 2007, which is the last alleged incident of sexual touching, M.P.T. alleges that the sexual touching and sexual solicitations by the personal respondent to M.P.T. had the effect of poisoning her work environment, which extended to her last day of employment on April 2, 2008. M.P.T. also alleges that the incidents leading up to M.P.T. being sent back to Mexico on April 2, 2008 constitute acts of discrimination in respect of employment because of sex. These allegations and my findings will be discussed in more detail below. In my view, the last incident of alleged discrimination raised in M.P.T.'s Application dates from early April 2008.

[92] The effect of the respondents' decision to return M.P.T. to Mexico resulted in her being out of this country for some 10 months, until she returned to Canada on February 18, 2009. Once again, her evidence is that she was not aware and no one informed her

of her rights under the *Code* or any of her employment rights in Canada. Before leaving Canada, M.P.T. testified that she went to see the Mexican consul and informed him of the sexual touching she had experienced from the personal respondent, and was told that there was nothing she could do and her best option was to return to Mexico. I accept this evidence. In these circumstances, in my view, M.P.T. cannot be faulted for taking no further steps to inquire about her rights during the time she was in Mexico or even after returning to Canada, given that she reasonably relied upon erroneous information from a person in authority from whom she sought information about her rights.

[93] Shortly before M.P.T.'s return to Canada, M.P.T. was contacted by the Windsor police about her experiences with the personal respondent, and she disclosed to the police what he had done to her. Once again, M.P.T. testified that she was not advised of any right to file a human rights application or make a civil claim for compensation and there is no evidence before me to contradict this. Upon her return to Canada, M.P.T. took steps to file a claim for refugee status on the basis of an incident that had occurred in Mexico. While there is no evidence before me to indicate that she took any steps to inquire about her rights under the *Code* following her return to Canada and up until she signed the consent forms to allow the CAW-Canada to represent her in this proceeding on June 18, 2009, this in my view is hardly surprising given that she had been told by the Mexican consul that there was nothing she could do and was not given any different information by the Windsor police. In my view, and in the context of M.P.T. being a migrant from Mexico who did not speak English, in these circumstances it would not be reasonable to expect M.P.T. to have done more. Accordingly, I find that the delay incurred by M.P.T. in making her application to this Tribunal was incurred in good faith within the meaning of s. 34(2) of the *Code*.

[94] Having found that any delay by O.P.T. and M.P.T. in making their applications to this Tribunal was incurred in good faith, I next need to consider whether any substantial prejudice would result to any person affected by the delay. I am satisfied that there is no substantial prejudice to the respondents as a result of any delay. With regard to O.P.T.'s

allegations, the personal respondent was put on notice of these allegations when he was criminally charged in December 2008, well within the one-year period under the *Code*. With regard to M.P.T., the personal respondent was put on notice of her allegations when he was criminally charged in February 2009, also well within the one-year period. As noted above, a preliminary inquiry was held in respect of the criminal charges during the period from September 2009 to April 2010, during which both O.P.T. and M.P.T. testified and were cross-examined extensively regarding their allegations.

[95] The only tangible prejudice asserted by the respondents is that at some point in time, the Mexican consulate in Leamington closed down. This, it was submitted, prejudiced the respondents' ability to respond to M.P.T.'s allegation that she spoke with the Mexican consul in early April 2008 and the evidence of O.P.T., M.P.T. and M.G.C. that the Mexican women from the house in Leamington had spoken previously to the Mexican consul about how they were being treated by the personal respondent, including M.P.T.'s evidence that she had reported to the Mexican consul that the personal respondent had slapped her on the buttock. In my view, this does not amount to significant prejudice caused by any delay in making the applications. The respondents led no evidence as to when the Mexican consulate in Leamington closed. Accordingly, there is no evidentiary basis upon which I can conclude that the fact that the applicants' allegations were brought in July 2009 as opposed to within what the respondents argue is the one-year period from the date of the last incident for O.P.T. (May 4, 2008) or M.P.T. (early April 2008) has had any impact on the respondents' ability to defend themselves in this case, particularly in light of the closure of the Mexican consulate in Leamington.

[96] More importantly, it has to be borne in mind that in determining whether the respondents have been "substantially prejudiced" by delay in the making of the Applications, the question is whether the respondents ability to defend themselves against the allegations in the human rights applications has been prejudiced by any delay. There is no indication that the respondents took any steps to attempt to locate the Mexican consul, nor is there any indication that they attempted to interview him

about what his potential evidence would be with respect to any issue in this case. At the end of the day, what I am left with is the bald assertion that a potential witness who may or may not have relevant evidence to give may or may not be available to testify, and that relevant documents that may or may not have been created may no longer be available. This is not a reason to find that the respondents were substantially prejudiced by a delay of at most a few months in the making of the Applications.

[97] Further, neither the personal respondent nor anyone from Presteve testified before me, and so I have no evidence that they experienced any actual prejudice arising out of any delay in making the applications.

[98] For these reasons, I decline to dismiss either Application for delay.

Assessment of credibility

[99] The onus is on the applicants to establish, on a balance of probabilities, that the respondents breached their rights under the *Code*. Clear, convincing and cogent evidence is required in order to satisfy the balance of probabilities test: *F.H. v. McDougall*, 2008 SCC 53.

[100] The parties agree that this case turns on my assessment of the credibility of O.P.T. and M.P.T. and whether I find their evidence in relation to the alleged violations of the *Code* to be credible on a balance of probabilities.

[101] In assessing credibility, I have been guided by the principles established in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.). At pp. 356-357, the British Columbia Court of Appeal stated:

> …Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The

> test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (…) Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken.

[102] My task is to consider whether, having regard to the totality of the evidence before me, each of the applicants has proven the material allegations that form the foundation of their claims that their *Code* rights have been violated on a balance of probabilities and on the basis of evidence that is clear, cogent and convincing. This necessitates an assessment of each applicant's credibility as it relates to their material allegations, having regard to the totality of the evidence.

Assessment of O.P.T.'s Credibility

[103] The material allegations made by O.P.T. that form the foundation of her claims that her rights under the *Code* have been violated are as follows:

- That the personal respondent invited and took O.P.T. out to dinner on many occasions when she did not want to go but felt compelled to do so under threat that the personal respondent would send her back to Mexico if she refused; that the personal respondent told O.P.T. that he loved her; and that he offered financial assistance for her children and housing for her in Mexico, which O.P.T. did not invite or accept;

- That in the car while taking O.P.T. out, the personal respondent on two or three occasions touched O.P.T.'s legs over her clothes up to her vagina; that on one occasion, he told her to pull her pants down and touched her bare legs and her vagina over her underwear; that on another occasion, the personal respondent undid his zipper and pulled O.P.T.'s hand into his pants to touch his erect penis; and that O.P.T. did not want to do these things but felt compelled to do so due to threats that the personal respondent would send her back to Mexico;

- That on several occasions in the personal respondent's office at the plant, the personal respondent touched and squeezed O.P.T.'s breasts over her clothing; that on one occasion, the personal respondent forcibly hugged and kissed O.P.T.; and that O.P.T. did not invite or want the personal respondent to do these things;

- That at the house in Leamington where O.P.T. was housed with the other Mexican women, the personal respondent forcibly hugged and kissed O.P.T., told her to suck his penis on three occasions, and penetrated her with his penis on three other occasions; and that O.P.T. did not invite or want to do these things but felt compelled to do so due to the personal respondent's threats to send her back to Mexico;

- That on May 4, 2008, the personal respondent called O.P.T. several times while she was out with friends, came to pick her up, tried to force her to give him her cellphone, tried to pry her cellphone from in between her legs, took her purse and emptied its contents on the side of the road, and forcibly pulled O.P.T. from the car; and

- That sometime in late August or early September 2008, the personal respondent called O.P.T. in Mexico and told her that he would be in Mexico and wanted to come visit her and her children at their home and said that he loved O.P.T.

[104] I find O.P.T.'s evidence to be credible on a balance of probabilities with regard to these material allegations. Her evidence regarding these allegations remained substantially consistent throughout her testimony and was not shaken on lengthy and detailed cross-examination. She was often emotional during her testimony in a manner that I found to be commensurate with the severity of her experiences. She was able to provide what I found to be telling and explicit details in relation to most of her material allegations that in my view support the conclusion that she was being truthful. And the personal respondent did not testify before me to contradict O.P.T.'s testimony on her material allegations, so I am not in the position of having to resolve a conflict between their evidence.

[105] With regard to O.P.T.'s allegations about being invited and taken out to dinner by the personal respondent, O.P.T.'s own evidence is consistent with the testimony of M.P.T. and M.G.C., who observed the personal respondent picking up O.P.T. at the house in Leamington and taking her out in the evenings after work and who observed that O.P.T. would be upset and crying when she returned back to the house. The personal respondent's special interest in O.P.T. also is corroborated by M.P.T., who testified that she was frequently called into the personal respondent's office at the plant

to discuss O.P.T. and who also testified that the personal respondent told her that he was interested in O.P.T. and her children.

[106] With regard to O.P.T.'s allegations about the incidents of sexual touching in the personal respondent's car, I appreciate and am alive to the fact that O.P.T. was not able to specify in her testimony before me when these incidents occurred during the course of her employment with Presteve from August 2007 to May 2008. But I found certain details in O.P.T.'s evidence about these incidents to be compelling, including the details that she was told by the personal respondent to pull her pants down in the car and that on another occasion the personal respondent pulled her hand inside his pants so that it touched his erect penis. These specific details in my view support the conclusion that O.P.T. was recalling specific things that had happened to her as opposed to fabricating her testimony.

[107] In addition, as part of his guilty plea in the criminal proceeding in respect of the sexual assault charges, the personal respondent admitted to touching O.P.T. on both of her legs while in the car. To clarify, there were two criminal proceedings against the respondent in respect of O.P.T.: the assault charges arising out of the May 4, 2008 incident, when he was alleged to have tried to pry O.P.T.'s cellphone out from in between her legs; and the sexual assault charges when he was accused of sexually assaulting O.P.T. and others but pled guilty to physical assault. The personal respondent's guilty plea in respect of the latter charges was clearly not in respect of the May 4, 2008 incident, where he already had been tried, found guilty and given an absolute discharge arising out of that incident. Accordingly, when he pleaded guilty to assaulting O.P.T. on March 1, 2011, the personal respondent was clearly admitting to some other occasion(s) when he touched both of O.P.T.'s legs in the car without her consent.

[108] In my Interim Decision dated January 4, 2013, I directed the personal respondent to provide details or context whereby he had touched both of O.P.T.'s legs in the car in a non-consensual but, according to him, non-sexual manner. The personal respondent did not do so, and did not testify before me to provide any response to O.P.T.'s

allegations or any context or explanation for his admission that he touched both her legs in the car. In my view, the personal respondent's own admission that he touched both of O.P.T.'s legs in the car lends further credence to O.P.T.'s allegations. In the circumstances, I find that the personal respondent's admission that he physically assaulted O.P.T. on some occasion(s) other than May 4, 2008 to be consistent with OPT's uncontradicted testimony that the personal respondent touched her in a non-consensual sexual manner.

[109] With regard to the incidents that are alleged to have occurred in the personal respondent's office at the plant, O.P.T.'s evidence that she was called into the personal respondent's office frequently is consistent with the special interest that the personal respondent showed in her. O.P.T.'s evidence that he touched her breasts over her clothing on several occasions while in the office is consistent with M.P.T.'s evidence that he also did this to her. Once again, I have no evidence before me to contradict these allegations, so I am not in a position of having to resolve a conflict in the evidence before me.

[110] With regard to the incidents that are alleged to have occurred at the house in Leamington, I was particularly struck by O.P.T.'s evidence regarding the first incident that occurred at the house, when the personal respondent forcibly hugged and kissed her. The details given by O.P.T. in her evidence when she recalled that she was grabbed by the personal respondent as she was taking her boots off and almost lost her balance when he pulled to him in my view evinced the hallmarks of a witness who was recalling an incident that actually happened as opposed to fabricating her evidence. I also was struck by the detail that two of the incidents where the personal respondent penetrated O.P.T. with his penis occurred in the bedroom that O.P.T. shared with three other women, while a third incident occurred in one of the other bedrooms, and that the three incidents where O.P.T. felt compelled to suck the personal respondent's penis occurred in the bathroom. I also was struck by O.P.T.'s emotional demeanour while giving evidence about these incidents, in which she displayed an understandable

reticence in speaking about these incidents and disgust and dismay at what had happened to her.

[111] In cross-examination, the respondents focused on the fact that O.P.T. had used the term “made love” in her interview with the police detective on December 18, 2008 in relation to the acts of sexual intercourse with the personal respondent. At the preliminary inquiry, O.P.T. initially denied that she had used this term. However, when the tape of the interview was played back for her and she heard the Spanish words that she had used, O.P.T. acknowledged that this is what she had said. But in her evidence at the preliminary inquiry and before me, O.P.T. was clear that she did not want to engage in these sexual acts and that she felt obligated to do so as a result of the personal respondent’s threats to send her back to Mexico. In her evidence at the preliminary inquiry and before me, O.P.T. did not refer to these sexual acts as “making love” but instead referred to the personal respondent penetrating her with his penis. She bristled at the suggestion that this act could be regarded as “making love” given that she felt forced to do so without her consent. In my view, having heard O.P.T.’s evidence, O.P.T.’s use of the term “made love” in her interview with the police detective was nothing more than a euphemism to describe the act of sexual intercourse, and cannot reasonably be regarded as a suggestion that this act was consensual. Indeed, in the transcript of her interview with the police detective, O.P.T. clearly states that she did not want this.

[112] There also was a suggestion during cross-examination that O.P.T. was paid for performing these sexual acts. There is no evidence before me to provide any foundation for this suggestion. O.P.T. was taken aback by this suggestion, and forcefully and very emotionally denied that this was the case. I have no hesitation in accepting her evidence on this point, given that this suggestion is without any evidentiary foundation and given my assessment of O.P.T.’s emotional demeanour in denying this allegation. But it does leave me in a state of confusion as to what precisely the respondents are suggesting. Is it their position that the personal respondent paid for sex with O.P.T., despite being her employer? Or is it their position that the sexual acts were consensual,

as might be suggested by their focus on O.P.T. saying that she "made love" with the personal respondent? Or do they deny that the personal respondent ever engaged in any sexual acts with O.P.T.? I have no idea as to the answers to these questions, as the personal respondent never testified before me. Once again, I am left in the position where I have no evidence before me from the personal respondent to contradict O.P.T.'s allegations about what occurred at the house in Leamington, so I am not in the position of having to resolve a conflict in the evidence as between O.P.T. and the personal respondent, whatever that evidence may have been.

[113] The respondents also point to the fact that, in her interview with the police detective on December 18, 2008, O.P.T. initially said that the personal respondent had sexual intercourse with her "one or three times", although shortly afterwards she told the police detective that it was "two or three times" and then said that it was "about three times". In her evidence at the preliminary inquiry and before me, O.P.T. was clear in her evidence that this had occurred on three occasions. In my view, this is not so much an inconsistency in O.P.T.'s evidence, given that she ultimately told the police detective that this had occurred on about three occasions which is consistent with her evidence before me. Rather, in her first recounting of these incidents to the police detective some seven or more months after they had occurred, I find that it more likely evinces the process of a witness recalling for the first time precisely how many times this had occurred. Consequently, this does not impact my assessment of O.P.T.'s credibility.

[114] With regard to the incident on May 4, 2008, O.P.T. was able to provide detailed evidence before me about what had occurred. Unlike at the criminal trial arising from this incident, I do not have the benefit of the personal respondent's version of this incident, as he did not testify before me. I found O.P.T.'s evidence regarding this incident to be detailed and credible. She was not shaken on cross-examination in relation to the details of this incident, and testified in a consistent manner about this incident throughout her evidence at the hearing.

[115] Indeed, the respondents took issue with the fact that O.P.T. was able to provide a lot of detail about the incident on May 4, 2008, but was unable to provide the same

level of detail in relation to the incidents of sexual touching. I do not disagree with the respondents that there was some lack of detail in O.P.T.'s evidence about the other alleged incidents of sexual touching, as compared to her evidence about the May 4, 2008 incident, and this certainly gives me pause in my assessment of her credibility. At the end of the day, however, I find that any difference in O.P.T.'s ability to recall details of the events in question can be attributed to the fact that O.P.T. had reported the May 4, 2008 incident to the police the very same day it happened (at the insistence of her friend who witnessed the incident and who threatened to go to the police with or without O.P.T.), that the incident was the subject of criminal charges against the personal respondent, and that O.P.T. testified at the criminal trial a relatively short time after the incident. In contrast, O.P.T.'s first disclosure regarding the sexual assaults occurred some seven months to over a year after these incidents had occurred. As a result, the variance in the level of detail with which O.P.T. was able to recall the May 4, 2008 incident as opposed to the incidents of sexual assault and touching does not alter my finding that she was a credible witness.

[116] With regard to the phone calls that are alleged to have been made by the personal respondent to O.P.T. after she returned to Mexico, once again I find O.P.T.'s evidence on this point to be consistent with the surrounding circumstances, including her evidence that the personal respondent previously had told her that he loved her and had expressed interest in her and her children and in providing financial support and housing for them in Mexico. As indicated above, the personal respondent's expression of interest in O.P.T. and her children is corroborated by M.P.T.'s evidence, which I find enhances the credibility of O.P.T.'s evidence that the personal respondent called her after she returned to Mexico. Once again, I have no contradictory evidence from the personal respondent on this point, so I am not in a position where I have to resolve a conflict in the evidence.

[117] In addition, in my view, the letter dated August 25, 2008 given by the personal respondent to O.P.T. supports the personal respondent's continuing interest in O.P.T. despite her having gone to the police and assault charges being laid against him arising

out of the May 4, 2008 incident. In my view, it is quite extraordinary that the personal respondent would offer O.P.T. a permanent position at the plant that she was free to exercise whenever she chose. Further, while O.P.T. did contact the personal respondent to request her return airline ticket and withheld wages, the personal respondent could have conveyed these to O.P.T. by other means, particularly since at that time he was under bail conditions arising out of the charges from the May 4, 2008 incident that prohibited him from being in contact with O.P.T. Instead, the personal respondent travelled to Windsor and may have acted in breach his bail conditions. The personal respondent's actions in providing this letter and meeting with O.P.T. in these circumstances in my view once again supports O.P.T.'s evidence regarding the singular and continuing interest that the personal respondent had in O.P.T. and lends support to the credibility of her evidence that the personal contacted her after she had returned to Mexico.

[118] Before me, the respondents took the position that O.P.T. fabricated her allegations against the personal respondent in an effort to advance her immigration status in this country and remain in Canada. In support of this position, the respondents submit that O.P.T. was offered inducements, including assistance with immigration matters, by the police in exchange for her testimony against the personal respondent in the criminal proceeding. It is noted that O.P.T. first disclosed the full extent of her sexual assault allegations against the personal respondent to the police, and was able to remain in Canada in part for the purpose of giving evidence at the preliminary inquiry. It is submitted that, when O.P.T. became aware that other individuals who had worked at Presteve had commenced a human rights application against the respondents, she saw and took advantage of an opportunity not only to claim monetary compensation from the respondents but also to remain longer in Canada while her testimony was required for the human rights proceeding. And it is noted that O.P.T. has relied, in part, on her allegations against the respondents in support of her outstanding application for permanent residency status on humanitarian and compassionate grounds.

[119] In my view, there are several problems with this submission. There is no question that, with the support of WEBLC counsel, O.P.T. relied upon her experiences with the personal respondent in order to obtain temporary residence status in Canada. Much has been made before me of the fact that, at the meeting with the immigration officer on August 11, 2008, while O.P.T. did disclose some aspects of her allegations against the personal respondent – that he was bothering her a lot, that he told her she was different than the other women who arrived with her, that he told her that he wanted her to love him even though he had a wife, that he would insist on taking her out to dinner even if she did not want to go, that he would threaten to send her back to Mexico if she refused, that he would be angry with her if she avoided going out with him and would treat the other women very badly, that he told her that he loved her and cared about her life – she did not disclose the more serious allegations of sexual touching and assault. O.P.T.'s evidence is that she did not do so because she was ashamed and humiliated by what the personal respondent had done to her, and she was reluctant to disclose these details to a man she did not know and in front of her lawyer and her boyfriend, to whom she had not disclosed the full extent of what had been done to her.

[120] My difficulty is with how O.P.T.'s failure on August 11, 2008 to disclose the full extent of what had been done to her fits with the respondents' position. At that time, O.P.T. was no longer working for Presteve as a result of the incident on May 4, 2008. Her work permit allowed her to work in Canada only for that one employer. At the time of the August 11, 2008 meeting, O.P.T. was working as a waitress and dancer at a strip club without a work permit that allowed her to do so. If, as the respondents suggest, O.P.T.'s interest was in advancing her immigration status in Canada and regularizing her ability to work elsewhere in Canada by fabricating allegations against the respondents, it seems to me that she would have every interest in making these allegations as dire and serious as possible, in the interest of increasing her chances of obtaining a temporary residence permit. But she did not do so.

[121] When she disclosed the full extent of her allegations to the Windsor police at an interview on December 18, 2008, it is correct that O.P.T. was told at the outset by the

police detective conducting the interview that there was a team working on the investigation and that this included resources to help with immigration issues. But this was before O.P.T. disclosed any details at all of her experiences. The interview proceeded and the police detective elicited all of the information about the sexual touching and assaults, and only after all that information had been provided by O.P.T. did the police detective return to the matter of immigration issues and indicate that the team included an immigration lawyer in Windsor who was helping other women at no cost. At this time, O.P.T. already had a lawyer at the WEBLC who was assisting her with immigration issues, which was at no cost because the WEBLC is a publicly-funded legal clinic. Furthermore, when the WEBLC closed its file in relation to O.P.T. in January 2009, it was not because O.P.T. was going to take advantage of this lawyer from the police "team", but because she was planning to retain a private lawyer to assist her with her refugee claim. O.P.T. did not ultimately do so, because this lawyer wanted to charge her a large fee which she could not pay. There is no evidence before me to indicate that O.P.T. took advantage of what had been offered to her by the police in order to advance her immigration status. That, in my view, is not consistent with the respondents' position.

[122] It is submitted on O.P.T.'s behalf that her evidence about what the personal respondent did to her is true, and that she did not disclose her experiences at an earlier time because she was ashamed, humiliated and scared. I find O.P.T.'s evidence on this point to be credible.

[123] It was argued before me that O.P.T.'s evidence in this regard is consistent with women's experience in terms of reporting sexual assault or harassment. In particular, reliance was placed upon the Supreme Court of Canada's decision in *R. v. W.(R.)*, [1992] 2 S.C.R. 122 at p. 136, where the Court found that, when assessing credibility, it was a reversible error of law to rely upon the stereotypical assumption that sexual assault survivors are likely to report the assault in a timely manner, stating (at p. 136):

> This reference [to evidence that the older children had not raised concerns about the conduct at issue] reveals reliance on the stereotypical but

> suspect view that the victims of sexual aggression are likely to report the acts, a stereotype which found expression in the now discounted doctrine of recent complaint. In fact, the literature suggests the converse may be true; victims of abuse often do not disclose it, and if they do, it may not be until a substantial length of time has passed.

[124] While the statement made by the Supreme Court of Canada was made in the context of child sexual abuse victims, a similar phenomenon as it pertains to women who experience sexual misconduct has been the subject of expert evidence as discussed in decisions of this Tribunal: see *Cugliari v. Telefficiency Corporation*, 2006 HRTO 7 at paras. 187 to 198, and *Curling v. Torimiro*, [1999] O.H.R.B.I.D. No. 17 at paras. 70 to 72.

[125] I do not disagree with the expert evidence given in other Tribunal cases that women who experience sexual misconduct often do not report or disclose this conduct due to feelings of shame, humiliation and embarrassment. However, it is not necessary for me to rely upon this general assertion in my assessment of credibility in the instant case, as I have found O.P.T.'s evidence as to her explanations for why she did not disclose the personal respondent's sexual misconduct at an earlier time and why she did disclose it at a later time to be credible on its own terms.

[126] O.P.T.'s evidence is that she ultimately disclosed the full extent of her experiences to the police detective because she was told that she could trust the police detective and felt supported. O.P.T. did not take steps to advance her immigration status in Canada on the basis of the further disclosure she had made to the police, but instead pursued a refugee claim arising out of the killing of her husband in Mexico.

[127] The respondents also took the position that O.P.T. fabricated her stories at the behest of the union. There is simply no basis for this suggestion. While the union did have some involvement with a different group of migrant workers at Presteve who were from Thailand, the evidence before me indicates that the union had no involvement whatsoever with O.P.T. prior to her signing the consent form in June 2009 for union

counsel to represent her in this proceeding. By that time, O.P.T. already had disclosed her allegations against the respondents to the police.

[128] The respondents made much in cross-examination of the fact that O.P.T. did have some supports in the Leamington area, but did not disclose the alleged sexual assaults and harassment to them. O.P.T. had a father who had worked as a seasonal agricultural worker in the area for some 20 years, and with whom she had contact. There was a Spanish-speaking priest at a church in the area. O.P.T. had Spanish-speaking friends in the area. There is a police station in Leamington and community support groups. However, I accept as credible O.P.T.'s explanation as to why she did not tell her father, friends or others who might be regarded as "supports" that she had been sexually harassed and subjected to sexual advances by her boss, on the basis of the shame and humiliation about which she gave evidence when she testified before me.

[129] Attention was focused by the respondents on O.P.T.'s evidence at the preliminary inquiry and before this Tribunal that she tried to tell the Leamington police on May 4, 2008 about other things that the personal respondent had done to her, but was told that the police only wanted to focus on the events on May 4, 2008. On May 4, 2008, O.P.T. was speaking to the police through her friend, who was acting as an interpreter. It is not clear to me what specifically O.P.T. may have tried to convey to the Leamington police about other incidents, how this was translated to the police by O.P.T.'s friend, how the police responded, or how the police response was translated to O.P.T. Given the information shared by O.P.T. with the immigration officer on August 11, 2008 and O.P.T.'s reluctance in disclosing specific details to the police detective on December 18, 2008, I find that it is unlikely that O.P.T. was as clear as saying to the Leamington police that she had been sexually assaulted by O.P.T. In these circumstances, I do not find that it stretches credulity that O.P.T. was asked by the Leamington police to focus on the immediate events that had brought her to the police station.

[130] The respondents also submit that O.P.T. was coached by the police detective when she provided the details of the sexual assaults at the interview on December 18, 2008. I do not read the transcript of the interview in that way. What I see from a review of the transcript as a whole is a witness who is very reluctant to provide specific details of the sexual assaults, but who ultimately does so in response to specific questions being asked of her about particular kinds of touching. In response, O.P.T. does not just parrot what the police detective has asked, but once prompted by a specific question, goes on to provide details about how the personal respondent touched or assaulted her in that manner.

[131] The respondents also took issue with the vagueness of O.P.T.'s recollection in her evidence at the hearing as to specifically when these incidents occurred. While O.P.T. was not able to provide even general evidence at the hearing before this Tribunal as to when the alleged events occurred, once again she had been able to provide at least some evidence as to timing when she testified at the preliminary inquiry in September 2009. She testified at the preliminary inquiry that the incident where she was asked by the personal respondent to touch his penis in the car occurred about October or November 2007, that the incidents where he made O.P.T. suck his penis at the house occurred sometime around March or April 2008, and that the incidents of penetration occurred in 2008 when it was still cold. Given the number and extent of the incidents with the personal respondent, it is not surprising to me that O.P.T. was unable to be more specific before me when she gave her testimony some five years after the fact.

[132] The respondents also point to the fact that O.P.T. renewed her contract with Presteve in late December 2007 or early January 2008 (the original work permit was for six months), and submit that, if O.P.T. had experienced everything that she alleges, then she would not have renewed her contract. In my view, this submission does not sufficiently appreciate the economically vulnerable position that migrant workers find themselves in. O.P.T. was sending money back to Mexico from her earnings at Presteve to help support her two children. Dr. Preibisch's evidence is that Mexican

workers in Canada earn approximately six times what their earnings would be from employment in Mexico. In my view, this provides a very strong incentive for O.P.T. to renew her contract and remain at Presteve, despite the abuse that she was experiencing. Given the nature of the temporary foreign worker program, the fact that work permits are tied to a specific employer, and that trying to find a different employer while in Canada poses immense difficulties for a migrant worker, including the need for any new employer to qualify for the program by obtaining a labour market opinion and the reality that in the interim migrant workers would lose access to the accommodation provided by their existing employer, the reality is that renewing her contract with Presteve was the only real choice that O.P.T. had if she wanted to remain in Canada and continue working legally to help support her children.

[133] A similar submission is made by the respondents in relation to the fact that O.P.T. continued to go out for dinner or to the house with the personal respondent during the period of her employment at Presteve from August 2007 to May 2008. She would not have done this, it is submitted, had she been experiencing the kind of treatment described in her evidence. Once again, in my view, this submission does not sufficiently appreciate the power that the personal respondent wielded over O.P.T. as a migrant worker. The consistent evidence from O.P.T., M.P.T. and M.G.C. is that the personal respondent would threaten to send them back to Mexico if they did not do what they were told. O.P.T.'s evidence is that this threat was made by the personal respondent specifically in relation to his requests for her to go out for dinner with him and his demands that she perform acts of a sexual nature. So O.P.T.'s choice was to do what she was told, or risk being sent back to Mexico and lose her ability to work and earn money in Canada that she could use to send back to help support her children. In these circumstances, I have no trouble believing O.P.T. that she continued to go out with the personal respondent, despite the incidents of unwanted sexual touching.

[134] Another issue raised by the respondents relates to the issue of who had keys to the house in Leamington where the Mexican women were staying. M.G.C. testified that initially only one woman in the house was given a key, but after three weeks all of the

women received a key. This is not consistent with the evidence of M.P.T. or O.P.T., who testified that only one person in the house had a key. I have heard evidence that, in accordance with the house rules imposed by the personal respondent, the door was to be locked at 10 p.m. each night and no one would be allowed into the house after that time. If each of the women had a key to the house, this would make no sense, as any of the women could simply let herself in. I also am mindful of O.P.T.'s evidence that she did not return to the house one night because she had been out after 10 p.m. and the door would be locked, and I am mindful of M.P.T.'s evidence about returning to the house after going for a coffee despite the personal respondent's admonition not to, and that she had to be let inside the house by one of the women. Given these circumstances, I prefer the evidence of O.P.T. and M.P.T. that only one woman in the house had a key. Moreover, the respondents did not lead any evidence that all of the women in the house were given keys even though this evidence presumably should have been available to them.

[135] A secondary issue relates to a conflict in the evidence as between M.P.T. and O.P.T. as to whether the personal respondent also had a key to the house. M.P.T.'s evidence is that the personal respondent had a key to the house. O.P.T.'s evidence is that, as far as she knows, the personal respondent did not have a key. Her evidence is that, on occasions when the personal respondent would take her to the house during the work day, he would ask O.P.T. to get the key from the woman in the house who held the key. In my view, nothing turns on this alleged conflict. Even if the personal respondent did have a key to the house, he may not have kept it at the plant. Or he may have wanted O.P.T. to have a key, so that she could lock up the house when she left. O.P.T.'s evidence is that the personal respondent would take her to the house, but would leave before the workers arrived and the workers would take her back to work. At the end of the day, I find nothing in this alleged conflict in the evidence that affects my assessment of O.P.T.'s credibility on the material issues before me.

[136] Then there is the matter of the evidence about going to the Mexican consulate. Much was made by the respondents of the fact that this had not been mentioned by

M.P.T. or O.P.T. before they testified before me. But there is no indication in the evidence before me that they were asked about whether they had done so on these previous occasions. Moreover, all three applicant witnesses were consistent in their evidence that, at some point relatively early in their time at Presteve, the women in the house went to see the Mexican consul as a group to complain about how they were being treated by the personal respondent. In my view, given the consistency in the evidence of these three women that this event happened, I find that it did occur despite it not having been mentioned previously. In addition, I find credible and accept O.P.T.'s evidence that she went to the Mexican consul for assistance in getting back her documents and unpaid wages after the May 4, 2008 incident.

[137] An issue was raised by the respondents that O.P.T. returned to Canada under false pretenses. In fact, under her temporary residence permit, O.P.T. was entitled to return to Canada. There is no question that her children were not covered by this permit, and O.P.T. acknowledged that she brought her children to Canada with the intention of claiming refugee status and seeking to remain here. She filed her refugee claim in December 2008, shortly after she returned with her children on November 24, 2008. In my view, this is a collateral issue that does not undermine my assessment of O.P.T.'s credibility in relation to the material allegations raised against the respondents. It is a reality that many visitors to Canada subsequently make refugee claims following their arrival in Canada in the hope of being able to stay here, sometimes due to valid fears of persecution in their home country and sometimes for economic reasons. The failure to declare their intention to claim refugee status immediately upon their arrival in Canada does not automatically mean that all such individuals are liars. Further, while O.P.T.'s refugee claim was ultimately denied, the denial was not based upon any adverse finding of credibility against her regarding the basis for her claim. Rather, the decision to deny her claim was based upon the availability of state protection in Mexico and the assessment that O.P.T. had not taken sufficient steps in her home country to avail herself of this state protection.

[138] There is no doubt that there are some inconsistencies in O.P.T.'s evidence regarding the allegations raised before me. O.P.T. testified before me that the personal respondent had asked her to touch his penis in the car on one occasion, while at the preliminary inquiry she said that this had occurred two or three times. There is also a slight discrepancy between O.P.T.'s evidence before me regarding the phone calls she received from the personal respondent in Mexico and what is recorded in the notes made by the WEBLC lawyer from a meeting in December 2008, namely that she spoke with the personal respondent the first time he called and was at the pharmacy the second time he called. There was considerable confusion in O.P.T.'s evidence at the preliminary inquiry as to whether she spoke about the personal respondent's sexual conduct when she was interviewed by the RCMP in the summer of 2009. There were inconsistencies in her evidence regarding her allegation that the personal respondent had threatened to kidnap her children, which was not mentioned in her interview with the police detective and was expressed as a fear on the part of her mother in the interview with the immigration officer. And there is the statement in O.P.T.'s application for permanent residency on humanitarian and compassionate grounds that she was molested by the personal respondent on "shopping trips", although this document is in English and was prepared by O.P.T.'s lawyer and O.P.T. testified before me that she had never seen the document before it was shown to her in cross-examination.

[139] My task is to consider whether these inconsistencies in O.P.T.'s evidence are sufficient to cause me to doubt the credibility of her evidence regarding the material allegations she has raised before me. I find that they are not. In my view, these inconsistencies are of a relatively minor nature in the overall context of O.P.T.'s evidence, and are the kind of details that can be misremembered or confused over time without taking away from the overall veracity of her evidence. In *R. v. Filion*, 2003 CanLII 517 (ON SC), the Court addressed the role that inconsistencies in the evidence may play in the assessment of credibility, including such things as whether any inconsistencies in the witness' evidence make the main points of the testimony less believable, whether the inconsistency is about something important or a minor detail, and whether it is an honest mistake or a deliberate lie: see para. 27. In applying these

principles, I find that the inconsistencies in O.P.T.'s evidence in the instant case do not make the main points of her evidence less believable, relate to relatively minor details in the overall context of her material allegations, and are more likely than not a function of the passage of time than a deliberate attempt to deceive.

[140] Finally, I cannot leave my assessment of the credibility of O.P.T.'s evidence without once again returning to the fact that the personal respondent never testified before me. The applicants have requested that I draw an adverse inference arising out of his failure to testify. In my view, it is not strictly necessary to do so, as I find that O.P.T.'s uncontradicted evidence on its own as to the main points of her allegations against the respondents is credible and is capable of standing on its own, even if I do not draw an adverse inference based on the personal respondent's failure to testify. Having said that, however, it also is my view that this is an appropriate case in which to draw an adverse inference against the respondents arising out of their failure to call the personal respondent to testify as a witness before me and be subjected to cross-examination for the purposes of assessing liability on a balance of probabilities.

[141] This Tribunal has recognized that the failure to call a witness who has material and direct knowledge of the disputed facts may allow the Tribunal to draw an adverse inference that the party did not call that witness because the witness would not have been supportive of that party's case: *Shah v. George Brown College*, 2009 HRTO 920 at para. 14; *Armstrong v. Anna's Hair & Spa*, 2010 HRTO 1751 at para. 44.

[142] A hearing before this Tribunal is in the nature of a civil proceeding, and is not a criminal proceeding where an accused is entitled to require the Crown to prove guilt beyond a reasonable doubt without any compulsion on the accused's part to take the stand. Given the very serious nature of the allegations before me, I would have expected to hear from the personal respondent. While counsel attempted to excuse the personal respondent on the basis of his age and ill health, I note that at the time of the hearing the personal respondent was in his early 70's and there is no medical evidence before me to substantiate that he was unable to testify before me due to health problems. I expressly put the respondents on notice that, if they were going to take the

position that the personal respondent was unable to testify due to health issues, then I would need to see medical documentation to support this, including whether any accommodation could be provided to him that would enable him to testify. No such medical documentation was produced. I also expressly advised the respondents that, if the personal respondent failed to testify and in the absence of any medical documentation to explain this, I may draw an adverse inference from his failure to do so.

[143] For these reasons, I draw an adverse inference due to the personal respondent's failure to testify before me. Specifically, the inference to be drawn is that the personal respondent's testimony would not have been supportive of the respondents' case.

[144] For all of the foregoing reasons, I find the evidence of O.P.T. to be credible as to the material points of her allegations against the respondents upon which I base my findings below.

Assessment of M.P.T.'s Credibility

[145] The material allegations made by M.P.T. that form the foundation of her claims that her rights under the *Code* have been violated are as follows:

- That on her first day of work at Presteve, the personal respondent slapped her on the buttocks;
- That on two occasions in the personal respondent's office at the plant, the personal respondent touched M.P.T.'s breast over her clothes;
- That on two occasions when in the car with the personal respondent when travelling to and from a doctor's appointment, the personal respondent sexually propositioned M.P.T. and touched her on her thigh while doing so; and that prior to the second appointment, the personal respondent also sexually propositioned M.P.T.; and
- That sometime in March 2008, the personal respondent told M.P.T. that she could not go out for a coffee and threatened to send her back to Mexico if she did, stated that M.P.T. needed to apologize to him for being disrespectful, and sent her back to Mexico in early April 2008 when she refused to do so.

[146] I find M.P.T.'s evidence to be credible on a balance of probabilities with regard to these material allegations. Her evidence regarding these allegations remained substantially consistent throughout her testimony and was not shaken on lengthy and detailed cross-examination. The feelings that she described in response to these incidents, which she identified as humiliation, anger and fear, in my view were consistent with the nature of the personal respondent's actions towards her and were evident in her emotional demeanour when testifying before me. Her evidence regarding the incidents was detailed and specific. And the personal respondent did not testify before me to contradict M.P.T.'s testimony on her material allegations, so I am not in the position of having to resolve a conflict in the evidence.

[147] With regard to the incident on her first day at work, M.P.T. was specific as to what occurred leading up to and following this incident. The fact that the personal respondent slapped M.P.T.'s buttock was witnessed by O.P.T. While I appreciate that O.P.T.'s evidence was that this incident occurred first thing in the morning when they arrived at work while M.P.T.'s evidence is that it occurred during a break, in my view this inconsistency is not significant given that these witnesses were recalling an event that had occurred approximately seven years before they testified before me. I prefer M.P.T.'s evidence that this incident occurred during a break, on the basis that, being the recipient of the slap, she is more likely to have a more accurate recollection of what time of day this occurred.

[148] With regard to the incidents in the personal respondent's office at the plant, I also find that M.P.T.'s evidence was detailed and specific. While she was not able to provide a specific date or time when these incidents occurred when she testified before me, I note that when she testified at the preliminary inquiry in the criminal proceeding much closer to the time when these incidents occurred, she was able to give an approximate timeframe. Further, the personal respondent himself admitted in the context of his plea in the criminal proceeding that he had touched M.P.T. on the chest on one occasion in his office, although he claimed that this was in a non-sexual manner. Despite being expressly invited by me to do so, the personal respondent did not testify before me to

provide any details or context to explain how he came to touch M.P.T.'s chest in his office. In my view, the personal respondent's admission in the criminal proceeding and his failure to testify before me to contradict M.P.T.'s evidence or provide context for his admission lends further credence to M.P.T.'s allegations.

[149] With regard to the incidents in the personal respondent's car on the way to and from the doctor's appointments and his sexual proposition before making the second doctor's appointment, once again M.P.T.'s evidence was detailed and specific both as to the sexual propositions made to her by the personal respondent and his touching of her thigh. Once again, in the context of the criminal proceeding, the personal respondent admitted to having touched M.P.T. on the leg above the knee on two occasions in his car on the way to doctor's appointment, although once again he claimed that this was in a non-sexual manner. And once again, despite my specific invitation for him to do so, the personal respondent did not testify before me to provide any details or context to explain how he came to touch M.P.T.'s leg above the knee in his car on two occasions in an allegedly non-sexual manner. Again, in my view, the personal respondent's admissions in the criminal proceeding and his failure to testify before me to contradict M.P.T.'s testimony or provide context for his admissions lends further credence to M.P.T.'s allegations.

[150] I raised the personal respondent's lack of any specific response or context to explain his guilty plea in an Interim Decision in this matter dated January 4, 2013, in which I stated (at para. 92):

> With regard to Worker 42 (M.P.T.), Jose Pratas needs to provide his evidence in response to the allegation about slapping Worker 42's left buttock in the workplace on her first day of work, and any recollection he has of the two incidents where Worker 42 alleges that she was called into his office and he touched her breast. I appreciate that Jose Pratas has admitted that on one occasion in his office, he touched Worker 42 in the chest, but it is unclear what if anything he has to say about the second alleged incident in his office or what evidence he may have to provide regarding any context for him touching Worker 42's chest in his office. Jose Pratas also needs to provide his evidence in response to Worker 42's allegations that he asked her sexually inappropriate questions on two

> trips to the doctor's office, what recollection he has regarding these two alleged incidents, and what context he has to provide for touching Worker 42's leg above the knee on these two trips to the doctor's office.

[151] The personal respondent did not provide any such information or context. He did not testify before me to deny the allegations or provide any such information or context. In my view, in the absence of any evidence from the personal respondent to explain how he came to touch M.P.T. in the manner to which he has admitted, the fact that he admitted doing so lends credence to M.P.T.'s evidence. Specifically, the personal respondent's guilty plea establishes beyond a reasonable doubt that the personal respondent touched M.P.T.'s chest and her legs without consent. This is consistent with M.P.T.'s uncontradicted evidence that the personal respondent touched her breast and her legs without her consent and in a sexual manner. The fact that the personal respondent, through his lawyer in the criminal proceeding where the standard of proof was "beyond a reasonable doubt", denied being guilty of sexual assault, is not evidence that the admitted non-consensual touching was not sexual in nature.

[152] With regard to the incident in March 2008, there is no dispute that M.P.T. was sent back to Mexico by the personal respondent in early April 2008. M.P.T.'s evidence about this incident and its aftermath was detailed and specific. Her evidence about the aftermath of this incident was supported by the evidence of O.P.T., who confirmed that the personal respondent was angry for M.P.T. having defied his order not to go out for a coffee and that the personal respondent wanted M.P.T. to apologize to him for having been disrespectful. And again, I have no evidence from the personal respondent to contradict M.P.T.'s testimony about this incident, so I am not in the position of having to resolve a conflict in the evidence.

[153] As with O.P.T., the respondents' position is that M.P.T. fabricated her allegations against the personal respondent in an effort to advance her immigration status in this country and remain in Canada. The respondents take the position that the first record of M.P.T. having disclosed the full extent of her allegations against the personal respondent is from a telephone interview with the police in February 2009 when M.P.T.

was still in Mexico, and that shortly afterwards M.P.T. returned to Canada and was able to remain in Canada in part for the purpose of giving evidence at the preliminary inquiry. As with O.P.T., it is submitted that, when M.P.T. became aware that other individuals who had worked at Presteve had commenced a human rights application against the respondents, M.P.T. saw and took advantage of an opportunity not only to claim monetary compensation from the respondents but also to remain longer in Canada while her testimony was required for the human rights proceeding. And it is noted that M.P.T. has relied, in part, on her allegations against the respondents in support of her outstanding application for permanent residency status on humanitarian and compassionate grounds.

[154] Once again, in my view, there are several problems with this narrative. M.P.T. first disclosed her allegations to the police on February 12, 2009, when she was still in Mexico. Her evidence is that when she spoke with the police, they did not ask her to return to Canada to testify in the criminal proceeding and did not make any offer of assistance to her with her immigration status in Canada. There is no evidence before me to contradict this. While M.P.T. did return to Canada on February 18, 2009, shortly after speaking with the police, there is no evidence that she took any steps to parlay the information she had provided to the police into any enhanced immigration status or ability to remain in Canada for a longer period of time. Rather, she sought to remain in Canada not based upon what had occurred at Presteve, but on the basis of a refugee claim arising out of an unrelated incident that had occurred in Mexico.

[155] As with O.P.T., another position advanced by the respondents was that M.P.T. fabricated her story at the behest of the union. There is simply no basis for this suggestion. As stated above, while the union did have some involvement with a different group of migrant workers at Presteve who were from Thailand, the evidence before me indicates that the union had no involvement whatsoever with M.P.T. prior to her signing the consent form in June 2009 for union counsel to represent her in this proceeding. By that time, M.P.T. already had disclosed her allegations against the respondents to the police.

[156] The respondents made much in cross-examination of the fact that M.P.T. had some supports in the Leamington area, but did not disclose the alleged sexual assaults and harassment to them. M.P.T. had the same father who had worked as a seasonal agricultural worker in the area for some 20 years, and with whom she had contact. There was a Spanish-speaking priest at a church in the area that was attended by M.P.T. She had Spanish-speaking friends in the area. There is a police station in Leamington and community support groups. However, M.P.T.'s evidence is that she did not disclose or report her experiences at an earlier point in time due to feelings of shame, embarrassment and humiliation, and I find her evidence on this point to be credible.

[157] Further, as discussed above, M.P.T.'s evidence is that she did disclose what had happened to her to the Mexican consul in Leamington and was told there was nothing she could do and to return to Mexico. M.P.T. did not solicit contact from the Windsor police when she was in Mexico, and provided the details of her allegations with no evidence of any inducement or promise of help in returning to or staying in Canada. When M.P.T. returned to Canada, she did not seek out the police or try to parlay her allegations to advance her immigration status, but instead claimed refugee status on the basis of an unrelated incident in Mexico.

[158] It is submitted by the respondents that M.P.T. was able to provide very specific details about some events, but not about others. For example, M.P.T. was able to give detailed evidence about the incident in March 2008 and its aftermath, while not being able to recall specifically when some of the incidents of alleged sexual touching occurred. However, M.P.T. had a clear recollection that the second incident on the way back from the doctor occurred on November 19, 2007, as she recalled that it was her birthday. She also had a specific recollection that the incident where the personal respondent touched her buttock was on her first day of work. Apart from testifying that the other incidents occurred somewhere in between, M.P.T. was not able to provide any specific dates or even general evidence in her testimony before me about when they occurred or even the sequence of events. In this regard, I note that at the preliminary

inquiry, at which M.P.T. testified in November 2009 at a time much closer to the events in issue, M.P.T. was able to provide some evidence as to the timing of these incidents, including that the first occasion in the office was perhaps two months after the slap on the buttock, and that the second incident in the office was about three months later. Once again, given that the first recorded disclosure of these incidents by M.P.T. was to the police in February 2009, over a year after these events occurred, it is not surprising to me that M.P.T. could not be more specific in terms of when these incidents happened.

[159] As with O.P.T., the respondents point to the fact that M.P.T. renewed her contract with Presteve in late December 2007 or early January 2008 (the original work permit was for six months), and submit that, if M.P.T. had experienced everything that she alleges, then she would not have renewed her contract. As stated above, in my view, this submission does not sufficiently appreciate the economically vulnerable position that migrant workers find themselves in. M.P.T. came to Canada with the goal of trying to improve her economic position. Dr. Preibisch's evidence is that Mexican workers in Canada earn approximately six times what their earnings would be from employment in Mexico. In my view, this provides a very strong incentive for M.P.T. to renew her contract and remain at Presteve, despite the abuse that she was experiencing. Given the nature of the temporary foreign worker program, the fact that work permits are tied to a specific employer, and that trying to find a different employer while in Canada poses immense difficulties for a migrant worker, including the need for any new employer to qualify for the program by obtaining a labour market opinion and the reality that in the interim migrant workers would lose access to the accommodation provided by their existing employer, the reality is that renewing her contract with Presteve was the only real choice that M.P.T. had if she wanted to remain in Canada and continue working.

[160] The respondents also submitted that M.P.T. would not have asked the personal respondent to take her to the doctor on the second occasion if the personal respondent has sexually propositioned her and touched in the manner she alleges. M.P.T.'s

evidence is that the migrant workers were only allowed to be taken to the doctor by the personal respondent. There is no evidence to contradict this. While the respondents attempt to portray the personal respondent as having been reluctant to take M.P.T. to the doctor on the second occasion and M.P.T. insisting that he do so, M.P.T.'s evidence – the only evidence before me on this point – tells a very different story. M.P.T.'s evidence was that she was suffering from a stomach inflammation and had tried medication which was not working. While it is true that the personal respondent said that she did not need to go see the doctor for this ailment, this was on the basis that the personal respondent himself had the cure – for M.P.T. to have sex with him. In this context, it is hardly surprising that M.P.T. would insist on going to see the doctor rather than accepting the personal respondent's so-called "cure".

[161] As with O.P.T., an issue was raised by the respondents that M.P.T. returned to Canada under false pretenses. M.P.T. denied that she intended to claim refugee status when she returned to Canada with her brothers in February 2009, and was coming as a visitor. She filed her refugee claim four months later in June 2009. I do not accept M.P.T.'s evidence on this point and find that she returned to Canada in February 2009 with an intention to try to remain here. However, in my view, this is a collateral issue that does not undermine my assessment of M.P.T.'s credibility in relation to the material allegations she has raised against the respondents. As I have stated above, it is a reality that many visitors to Canada subsequently make refugee claims following their arrival in Canada in the hope of being able to stay here, sometimes due to valid fears of persecution in their home country and sometimes for economic reasons. The failure to declare their intention to claim refugee status immediately upon their arrival in Canada does not automatically mean that all such individuals are liars. Further, while the M.P.T.'s refugee claim was ultimately denied, as with O.P.T. the denial was not based upon any adverse finding of credibility against her regarding the basis for her claim. Rather, the decision to deny her claim was based upon the availability of state protection in Mexico and the assessment that M.P.T. had not taken sufficient steps in her home country to avail herself of this state protection.

[162] An issue was raised about the discrepancy in M.P.T.'s evidence about how long she had worked at a greenhouse without a work permit after she returned to Canada in February 2009. At the preliminary inquiry, M.P.T. said that she had worked there for 15 days, while before me she said that it was no more than five days. In my view, this is an entirely collateral and peripheral matter that does not undermine my assessment of the credibility of M.P.T.'s evidence on the material allegations before me.

[163] There is no doubt that there are some inconsistencies in the evidence of M.P.T. regarding the allegations raised before me. On the second occasion when the personal respondent touched M.P.T.'s breast in his office, M.P.T. testified at the preliminary inquiry that she did not recall why she had been called into the office on that occasion, while before me she testified that she had been called in to discuss some issue regarding her sister. With regard to the first trip to the doctor, M.P.T. testified at the preliminary inquiry that she moved her legs to the side and the personal respondent took his hand away, while before me she testified that she took his hand away. With regard to the second trip to the doctor, M.P.T. testified at the preliminary inquiry that she took his hand away but did not mention moving to the side, while before me she testified that she moved her legs to the side and took his hand away. With regard to the final incident in the plant office before M.P.T. was sent home, M.P.T.'s testimony at the preliminary inquiry indicates that she was the one who first raised calling the police, while before me she testified that the personal respondent was the one who first threatened to call the police. M.P.T. testified that she told her sister about being touched by the personal respondent, whereas O.P.T. says that she was not told about this and was only exhorted by M.P.T. to come home with her due to the way they were being treated by the personal respondent. M.P.T. testified that at the first visit with the Mexican consul, she raised the fact that the personal respondent at least had slapped her buttock, while O.P.T. and M.G.C. testified that none of the women raised any issue about being touched by the personal respondent.

[164] As I have stated above, my task is to consider whether these inconsistencies in M.P.T.'s evidence are sufficient to cause me to doubt the credibility of her evidence in

relation to the material allegations she has raised before me. I find that they are not. In my view, these inconsistencies are of a relatively minor nature in the overall context of the applicants' evidence, and are the kind of details that can be misremembered or confused over time without taking away from the overall veracity of her evidence. Applying the principles from *R. v. Filion*, above, I find that the inconsistencies in the evidence of M.P.T. in the instant case do not make the main points of her evidence less believable, relate to relatively minor details in the overall context of her allegations, and are more likely than not a function of the passage of time than a deliberate attempt to deceive.

[165] Finally, as discussed in the context of my assessment of O.P.T.'s credibility, I also rely upon the fact that the personal respondent never testified before me to contradict M.P.T.'s allegations in finding M.P.T.'s evidence to be credible on the material allegations before me. As stated above, while it is not strictly necessary to draw an adverse inference against the personal respondent in order to conclude that M.P.T.'s evidence regarding her material allegations is credible, it also is my view that this is an appropriate case in which to draw such an adverse inference and I do so.

[166] For all of the foregoing reasons, I find the evidence of M.P.T. to be credible as to the main points of her allegations against the respondents upon which I base my findings below.

Findings as to violations of the *Code*

Findings with respect to O.P.T.

[167] Having found the evidence of O.P.T. to be credible as to the main points of her allegations against the respondents, I make the following factual findings relating to the period of O.P.T.'s employment with Presteve from early August 2007 to May 4, 2008:

- That shortly after she started work at Presteve, the personal respondent began to separate O.P.T. from the other Mexican women, and invited her out to eat dinner with him alone on many occasions; that the personal respondent told O.P.T. on several occasions that he

loved her and that she was different from other women; and offered to open two bank accounts for O.P.T.'s children and also offered to buy her a house or apartment in Mexico;

- That when O.P.T. told the personal respondent that she did not want to go out to eat with him, he yelled at her and told her that if she did not go, he would send her back to Mexico; and that O.P.T. felt obligated to accept the personal respondent's invitations because she needed to work and did not want to be sent back to Mexico;

- That O.P.T. told the personal respondent many times that she did not want to be out with him and that she was sometimes crying when she was out with him, and that at times she would be upset and crying when she returned home after these outings;

- That when O.P.T. was in the car alone with the personal respondent, on two or three occasions he touched her legs with his right hand while he was driving and moved his hand along both of her legs and touched her vagina over the top of her clothes; that O.P.T. told the personal respondent that she did not want him to do this; and that when the personal respondent put his hand on her legs, she told him not to touch her and took his hand away, but the personal respondent continued to touch her until she said no several times;

- That on one occasion when O.P.T. was in the car alone with the personal respondent, he asked her to take her pants down and became very angry and started to yell and threaten to send her back to Mexico when she said no; that O.P.T. felt that she had to do this even though she did not want to; and that when O.P.T. pulled her pants down, the personal respondent touched her legs with his hand and touched her vagina over the top of her underwear;

- That on another occasion when O.P.T. was in the car alone with the personal respondent, the personal respondent pulled down the zipper of his pants and told her to touch his penis; that O.P.T. felt that she had to do this because if she did not, the personal respondent could become more aggressive; and that the personal respondent pulled O.P.T.'s hand so that it touched his penis when he had an erection;

- That on several occasions in the personal respondent's office, the personal respondent put his hand inside O.P.T.'s work coat and touched and squeezed her breasts over the top of her clothes, and that O.P.T. did not want him to do this;

- That on one occasion, the personal respondent hugged and kissed O.P.T. on the mouth in his private office and told her that he loved her,

and that O.P.T. did not want him to kiss her and had not given him permission to do so;

- That on one occasion when O.P.T. was alone with him at the house in Leamington, the personal respondent grabbed her hand, pulled her to him and then hugged her with force and said "give me a little kiss"; and that although O.P.T. resisted and said no, the personal respondent proceeded to kiss her on the mouth when she did not want or invite him to do this;

- That on three other occasions when they were alone together at the house, the personal respondent asked her to suck his penis and said "just love me a little bit" and threatened to send her back to Mexico if she did not do so; that O.P.T. did suck the personal respondent's erect penis on these occasions in the bathroom at the house in Leamington; and that O.P.T. did not want to do this, but did it because she needed her job and feared that the personal respondent would send her back to Mexico if she refused; and

- That on another three occasions when they were alone together in the house, the personal respondent told O.P.T. to pull her pants down, and then climbed on top of her and penetrated her with his penis; that this occurred twice in the bedroom that she shared with her sister and two other women, and once in one of the other bedrooms; and that O.P.T. did not want to do this, but was afraid that the personal respondent would send her back to Mexico if she refused.

[168] On the basis of these factual findings, I find that the personal respondent engaged in a persistent and ongoing pattern of sexual solicitations and advances towards O.P.T. during the period of her employment with Presteve. I find that, as the owner and principal of Presteve at that time, the personal respondent was a person in a position to confer, grant or deny a benefit or advancement to O.P.T., and that he expressly wielded this authority by threatening to send O.P.T. back to Mexico if she refused his sexual solicitations and advances. I further find that the personal respondent knew or ought reasonably to have known that these sexual solicitations and advances were unwelcome, particularly in light of the fact that O.P.T. expressly resisted and rejected his solicitations and advances on many occasions. Accordingly, I find that the personal respondent engaged in a pattern of persistent violations of s. 7(3)(a) of the *Code* during the period of O.P.T.'s employment with Presteve.

[169] In addition, on the basis of the above factual findings, I also find that the personal respondent engaged in a persistent pattern of sexual harassment in the workplace towards O.P.T., in violation of s. 7(2) of the *Code*. Based upon my factual findings, there can be no question that the personal respondent's conduct satisfies the definition of "harassment" under the *Code* and that his conduct was sexual in nature. An issue arises, however, regarding the extent to which his conduct can be regarded as having occurred "in the workplace". Certainly, the incidents that occurred in the personal respondent's office at the plant took place in the workplace. In addition, the evidence before me indicates that the personal respondent took O.P.T. to the house in Leamington and sexually assaulted and harassed her there in the context or under the guise of work-related duties, namely overseeing workers at the house to ensure that no property was stolen.

[170] The issue is whether the incidents involving the personal respondent taking O.P.T. out to dinner after work and the sexual harassment in the car also can be regarded as having been "in the workplace". In my view, it can. In *C.U. v. Blencowe*, 2013 HRTO 1667, this Tribunal stated (at para. 22):

> The Tribunal has found that incidents of harassment need not occur in the physical workplace to find that they occurred "in the workplace" for the purposes of section 7(2). See: *S.S. v. Taylor*, 2012 HRTO 1839 at paragraphs 53-56, and *Hughes*, 2009 HRTO 341, at paragraph 75. In *S.S. v. Taylor*, the Tribunal noted that in *Janzen*, [1989] 1 S.C.R. 1252, the Supreme Court of Canada defined sexual harassment as "…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". Accordingly, incidents of harassment occurring outside of the physical workplace can be found to have occurred "in the workplace" if they have a sufficient connection to the applicant's employment.

[171] Based upon the factual findings I have made, the personal respondent compelled O.P.T. to go out to dinner with him and sexually harassed her in his car under threat that he would send her back to Mexico if she did not comply with his demands. The personal respondent was the owner and principal of Presteve at this time, and was in a position of authority over O.P.T. It is clear from the evidence before me that the

personal respondent's conduct, including the sexual harassment that occurred at dinner and in his car, detrimentally affected O.P.T.'s work environment and occurred under threat of adverse job-related consequences. Due to these factors, I find that the personal respondent's sexual harassment towards O.P.T. that occurred at dinner and in his car has a sufficient connection to O.P.T.'s employment to be regarded as sexual harassment "in the workplace" within the meaning of s. 7(2) of the *Code*.

[172] I further find that the personal respondent's pattern of persistent and unwanted sexual solicitations and advances and sexual harassment towards O.P.T. created a sexually poisoned work environment for her in violation of s. 5(1) of the *Code*. The test for finding a poisoned work environment recently was articulated by the Ontario Court of Appeal as follows:

> ... There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created. ...
>
> Moreover, except for particularly egregious, stand-alone incidents, a poisoned workplace is not created, as a matter of law, unless serious wrongful behaviour sufficient to create a hostile or intolerable work environment is persistent or repeated.
>
> See *General Motors of Canada Ltd. v. Johnson*, 2013 ONCA 502 at paras. 66-67.

[173] While the test articulated in the *Johnson* decision relates to the issue of whether a poisoned work environment has created the basis for an allegation of constructive dismissal, the Ontario Divisional Court has confirmed that this test is equally applicable in relation to the issue of whether a poisoned work environment exists in the human rights context: see *Crêpe It Up! v. Hamilton*, 2014 ONSC 6721 at paras. 18-19.

[174] As a result, the question for me in determining whether the personal respondent's sexual solicitations and advances and sexual harassment created a sexually poisoned work environment for O.P.T. is whether the personal respondent's actions can be regarded as "serious wrongful behaviour sufficient to create a hostile or intolerable work environment that is persistent or repeated". In my view, there can be no

question that the personal respondent's conduct meets and in fact far surpasses this standard.

[175] With regard to the incident that occurred on May 4, 2008, I find that the personal respondent made repeated phone calls to O.P.T. to ascertain her whereabouts, that he insisted on coming to pick her up, that he yelled at her about why she was not answering her phone and demanded that she turn over her cellphone to him, that he attempted by force to pry her cellphone from in between her legs, that he grabbed her purse and emptied its contents looking for her phone, and that he grabbed her by the wrists and pulled her out of the car. While I do not have the full transcript of the decision of the criminal trial arising out of this incident before me, I appreciate that the factual findings that I have made in this proceeding may differ from the factual findings made by the judge in the criminal trial. However, I note that the personal respondent appears to have testified and to have provided his version of the incident at the criminal trial, whereas he did not do so before me; and I further note that the standard of proof at a criminal trial is proof beyond a reasonable doubt, which is a higher standard than is applicable in this proceeding, which uses the civil standard of proof on balance of probabilities.

[176] While I appreciate the evidence before me that O.P.T. was supposed to be at work on May 4, 2008, I find that the personal respondent's actions on that day went far beyond what reasonably would be expected of an employer in dealing with an employee who had not shown up for work. Rather, in the overall context of what I can only understand as the personal respondent's misguided and unwanted desire to have a sexual relationship with O.P.T., I find that the personal respondent's actions were manifestations of an attempt by him as a man to exercise power, control, dominance and authority over O.P.T. as a woman, which I find to constitute discrimination because of sex in respect of employment contrary to s. 5(1) of the *Code*.

[177] With regard to the phone call by the personal respondent to O.P.T. in late August or early September 2008 when she was back in Mexico, I find that the personal respondent initiated the call and told O.P.T. at least that he was going to be in Mexico

on business, and that he wanted to come to O.P.T.'s house and see her children. While O.P.T. initially could not recall what else the personal respondent had said to her on this phone call, she had discussed this phone call with her WEBLC lawyer sometime in December 2008 as recorded in the lawyer's notes. After prompting on the basis of her WEBLC lawyer's notes, O.P.T. testified that she also recalled the personal respondent telling her that he loved her and saying "why don't you believe everything I told you?" On the basis of my observation of this witness and assessment of her credibility, I am satisfied that this was a genuine present recollection of what the personal respondent also said to her on this phone call, and not merely a repetition of what was indicated in the WEBLC lawyer's notes. Accordingly, I find as a matter of fact that the personal respondent also told O.P.T. that he loved her and said "why don't you believe everything I told you?"

[178] Even without consideration of O.P.T.'s further recall of what the personal respondent said after being prompted from the WEBLC lawyer's notes, I find that, in the overall context of the personal respondent's pattern of sexual solicitations and advances towards O.P.T. and his misguided and unwanted attempts to have a sexual relationship with her, the expression of the personal respondent's interest in coming to O.P.T.'s house and seeing her children is properly regarded as a sexual solicitation or advance within the meaning of s. 7(3)(a) of the *Code*. Further, on the basis of O.P.T.'s further recollection that the personal respondent told her that he loved her on this call, I find that there can be no doubt that this phone call was a further sexual solicitation or advance.

[179] In this context, I was referred to this Tribunal's decision in *Smith v. Rover's Restaurant*, 2013 HRTO 700, as authority for the proposition that a finding of a violation of the *Code* can arise from communications by an employer to an employee following the termination of her employment. Although the letters sent by the respondent in the *Smith* case and his uninvited visits to the applicant's home were of a much more serious nature than the personal respondent's telephone call to O.P.T. in the instant case, in my view the distinction is a matter of degree. The *Smith* decision does not preclude a

finding of liability as against the personal respondent arising out of his phone call to O.P.T. I also note that much of the discussion in the *Smith* case was devoted to the issue of whether the respondent's actions in that case could properly be regarded as having been "in respect of employment" within the meaning of s. 5(1) of the *Code*, which is an issue that does not arise on the language of s. 7(3)(a) of the *Code*.

[180] At the time of the phone call, I find that the personal respondent was a person in a position to confer, grant or deny a benefit or advancement on the basis of the August 25, 2008 letter providing an open-ended offer to O.P.T. of permanent employment at Presteve. Given his position as owner and principal of Presteve at that time, I find that the personal respondent was in a position to rescind this offer at any time. I further find that, given O.P.T.'s repeated resistance to and rejection of his sexual solicitations and advances prior to this phone call, the personal respondent knew or ought reasonably to have known that both his request to visit her and her children at their home in Mexico and his expression of love for O.P.T. were unwelcome. Accordingly, I find that by making this phone call to O.P.T. and saying the things that I have found that he said, the personal respondent engaged in a further violation of s. 7(3)(a) of the *Code*.

Findings with respect to M.P.T.

[181] Based on the evidence of M.P.T., which I have found to be credible with respect to the material points of her allegations against the respondents, I make the following factual findings relating to the period of M.P.T.'s employment with Presteve from early August 2007 to early April 2008:

- That on M.P.T.'s first day of work at Presteve, the personal respondent came up behind her in the hallway and slapped her with one hand on her left buttock;

- That the personal respondent twice touched M.P.T.'s breast for a few seconds over her clothing with an open palm when she was alone with him in his private office at the plant; that M.P.T. took his hand away by grabbing his wrist and pulling it away and told the personal respondent that he should respect her; and that M.P.T. did not give the personal respondent permission to touch her breast;

- That the personal respondent asked M.P.T. to have sex with him and touched her leg on two occasions when he was taking her to see the doctor;

- That on the first occasion, the personal respondent sexually propositioned M.P.T. on the way to and from the doctor's office; that on the way back from this appointment, the personal respondent touched M.P.T. while sexually propositioning her by placing his right hand across her left thigh; that M.P.T. removed the personal respondent's hand from her leg and rejected his sexual propositions;

- That prior to the second occasion on November 19, 2007, M.P.T. went to the personal respondent's office to ask him to take her to the doctor, and the personal respondent said that if she had sex with him, all of her symptoms would disappear; and that M.P.T. told the personal respondent that what he was saying was not right and that he should respect her; and

- That on the way to and from the doctor on November 19, 2007, the personal respondent again sexually propositioned M.P.T.; that on the way back after seeing the doctor, the personal respondent touched M.P.T.'s thigh with his right hand while he continued to sexually proposition her; that M.P.T. moved his hand off her leg and once again told the personal respondent no; and that when M.P.T. was getting out of the car at the house in Leamington, the personal respondent again told her to think about it.

[182] On the basis of these factual findings, I find that the personal respondent engaged in a pattern of sexual solicitations and advances towards M.P.T. during the period of her employment with Presteve. I find that, as the owner and principal of Presteve at that time, the personal respondent was a person in a position to confer, grant or deny a benefit or advancement to M.P.T. I further find that the personal respondent knew or ought reasonably to have known that these sexual solicitations and advances were unwelcome, particularly in light of the fact that M.P.T. expressly resisted and rejected his solicitations and advances. Accordingly, I find that the personal respondent engaged in a pattern of violations of s. 7(3)(a) of the *Code* during the period of M.P.T.'s employment with Presteve.

[183] In addition to the above finding, and on the basis of the factual findings I have made, I also find that the personal respondent engaged in a pattern of sexual

harassment towards M.P.T. in violation of s. 7(2) of the *Code*. With regard to the issue of whether the personal respondent's sexual harassment of M.P.T. can properly be regarded as having been "in the workplace" within the meaning of s. 7(2) of the *Code*, it is clear that the incident that occurred on M.P.T.'s first day of work and the two incidents in the personal respondent's office at the plant took place in the workplace. It also is clear that the sexual solicitations made by the personal respondent to M.P.T. when she approached him about making an appointment to see the doctor on the second occasion took place in the workplace.

[184] With regard to the incidents that occurred in the car on the way to and from the two doctor's appointments, I find that there is a sufficient connection to M.P.T.'s employment to justify regarding the sexual harassment that occurred during these trips to have been "in the workplace" within the meaning of s. 7(2) of the *Code*. M.P.T.'s evidence, which was not contradicted, was that the personal respondent had told the migrant workers that only he could take them to see the doctor. The evidence before me also indicates that the personal respondent told the migrant workers that a violation of his rules could result in them being sent back to Mexico and the employment relationship with Presteve thereby ended. Given this potential consequence, it is my view that the requirement for the personal respondent to take M.P.T. to the doctor became a condition of her employment with Presteve. I further find that the personal respondent's sexual harassment of M.P.T. in his car detrimentally affected M.P.T.'s work environment and the requirement that the personal respondent take M.P.T. and other migrant workers to the doctor was imposed under threat of adverse job-related consequences.

[185] I further find that the personal respondent's pattern of unwanted sexual solicitations and advances and sexual harassment towards M.P.T. created a sexually poisoned work environment for her in violation of s. 5(1) of the *Code*. In accordance with the test for finding a poisoned work environment cited above, I find that the personal respondent's actions can be regarded as "serious wrongful behaviour sufficient to create a hostile or intolerable work environment that is persistent or repeated".

[186] With regard to the events leading up to M.P.T. being sent back to Mexico in early April 2008, I find that at some point in March 2008, the personal respondent came to the house in Leamington looking for M.P.T.'s sister and that, when M.P.T. indicated that she did not know where O.P.T. was, the personal respondent told M.P.T. that she was not allowed to leave the house to go out for a coffee and that he would send her back to Mexico if she defied his order. I further find that, through intermediaries including O.P.T., the personal respondent demanded that M.P.T. apologize to him for being disrespectful. I find that when M.P.T. went to the personal respondent's office to discuss the issue and what he had said to her sister about M.P.T., the personal respondent told M.P.T. to get out of his office and that he did not want to see her and grabbed M.P.T.'s arms above the elbows and pushed her towards the door to the plant. I find that a few days later, M.P.T. was sent back to Mexico by the personal respondent.

[187] While the applicants have argued that these events amount to reprisal contrary to the *Code*, it is my view that the evidence before me does not support such a finding. In order to amount to reprisal in violation of s. 8 of the *Code*, there needs to be evidence that M.P.T. sought to claim and enforce her *Code* rights and experienced reprisal for so doing. Here, while M.P.T. certainly sought to claim her right to go out for a coffee, this is not a right protected under the *Code*. There is no evidence before me to indicate that M.P.T. sought to claim or enforce her *Code* rights prior to or during these events.

[188] Section 7(3)(b) protects a person from reprisal for the rejection of a sexual solicitation or advance. While the evidence before me supports that M.P.T. did reject the sexual solicitations and advances made towards her by the personal respondent, I am not satisfied that the evidence before me supports that the personal respondent's actions leading up to M.P.T. being sent back to Mexico were "for" the rejection by M.P.T. of his sexual solicitations and advances within the meaning of s. 7(3)(b), which I interpret to mean that there must be some link or connection between the rejection and the impugned actions. Here, in my view, the evidence indicates that the personal respondent was upset because O.P.T. was not at the house, and may have misdirected his anger towards M.P.T. But the evidence does not indicate that he refused to allow

M.P.T. to leave the house to get a coffee or regarded her as having been disrespectful for defying his order because M.P.T. previously had rejected his sexual solicitations and advances.

[189] However, I find that the personal respondent's actions leading up to M.P.T. being sent back to Mexico constitute discrimination against M.P.T. because of sex in respect of employment, contrary to s. 5(1) of the *Code*. I see the personal respondent's actions in the gendered context of his persistent attempts to have a sexual relationship with O.P.T., even though he knew or ought to have known they were unwelcome, and as emanating from his upset that O.P.T. was not available to him when he wanted. I then see the personal respondent attempting to exercise power and control over M.P.T. as a woman as punishment for her not being able to tell him where O.P.T. was. And when M.P.T. as a woman defied the personal respondent's attempt to exercise power and control over her, the personal respondent became enraged and insisted that M.P.T. apologize to him and sent her back to Mexico when she failed to do so. In my view, these events evoke the characteristics of a man in a position of authority attempting to exercise power and control over a woman, and becoming enraged and retaliating against her when she defies him.

Liability of Corporate Respondent

[190] With regard to the corporate respondent, the corporate respondent is deemed to be liable for the violations of s. 5(1) of the *Code* by the personal respondent pursuant to s. 46.3 of the *Code* as acts or things done by him as an officer, official or employee of the corporate respondent in the course of his employment. As observed by the Supreme Court of Canada in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, the term "in the course of employment" does not require that the impugned actions of an employee fall within the four squares of a job description, but means only that these actions are in some way related or associated with the employment within a purposive interpretation of human rights legislation. In the instant case, the personal respondent's position as owner and principal of the corporate respondent at the time imbued him by virtue of this employment with the power and authority to take the

actions that he did against O.P.T. and M.P.T. That is sufficient to ground a finding of liability as against the corporate respondent under s. 46.3 of the *Code*.

[191] As a result, given that I have found that all of the personal respondent's sexual solicitations and advances and sexual harassment toward both O.P.T. and M.P.T. also provide a basis for finding a sexually poisoned work environment contrary to s. 5(1) of the *Code*, and given that I have found other violations of s. 5(1) of the *Code* based upon the personal respondent's actions, I find that the corporate respondent is equally liable with the personal respondent for all acts or things related to O.P.T. and M.P.T. that I have found to be in violation of the *Code*, save and except for the phone call made to O.P.T. in Mexico where I have found liability solely on the basis of s. 7(3)(a) of the *Code*.

[192] Pursuant to s.46.3 of the *Code*, a corporation is not automatically deemed to be liable for s. 7 infringements committed by one of its officers, officials or employees. However, this does not mean that a corporation can never be liable for harassment or sexual solicitations or advances committed by its officers, officials or employees. Where the person responsible for a violation of s. 7 of the *Code* can properly be regarded as part of the "directing mind" of the corporate respondent, it has repeatedly been held that this provides a basis for imposing equal liability on the corporate respondent despite the language of s. 46.3: see *Ontario Human Rights Commission v. Farris*, 2012 ONSC 3876 (Div.Ct.) at para. 33; *Curling v. Torimiro*, above; *M.K. v. […] Ontario*, 2011 HRTO 705; *Boldt-Macpherson v. The Hoita Kokoro Centre*, 2008 HRTO 35.

[193] In the instant case, given that the personal respondent was the owner and principal of the corporate respondent at the time of the events at issue, there is no question that he was part of the directing mind of the corporate respondent. Accordingly, I find that the corporate respondent is also liable for all violations of s. 7 that I have found as against the personal respondent.

[194] In final submissions before me, the corporate respondent noted that I have the discretion to apportion any award I might make and that I need not impose joint and

several liability on all respondents. It was submitted that since control over the corporate respondent passed from the personal respondent to his son, the company has continued to hire migrant workers, has re-hired some of the migrant workers who complained about the actions of the personal respondent, and has experienced no further problems with the union or with migrant workers. The first difficulty I have with this submission is that no evidence was called before me to support this submission. The current owner and principal of the company was not called to testify before me to attest to these propositions. In addition, it is my view that actions taken by a company subsequent to events that give rise to liability under the *Code* do not form a proper basis upon which to insulate the company from liability or reduce its financial responsibility to compensate persons whose rights were violated by a former owner and principal of the company. Accordingly, I find the corporate respondent to be jointly and severally liable with the personal respondent for all violations of the *Code* that I have found and for all financial compensation that I award.

Remedy

[195] The applicants request a number of remedies in this proceeding, including: a declaration of the violation of their rights by the respondents; orders for monetary compensation to the applicants for injury to their dignity, feelings and self-respect, in the amount of $150,000 for O.P.T. and $100,000 for M.P.T.; pre-judgment interest; a public interest order requiring Presteve to provide all employees under the temporary foreign worker program with human rights information and training in their native language; and such further relief as the Tribunal might deem appropriate.

[196] No request is made for any compensation for lost wages.

Declaration

[197] I already have found that the respondents violated ss. 5(1), 7(2) and 7(3)(a) of the *Code*, and as such, it is not necessary to provide specific declaratory relief. I will, however, incorporate my findings as part of my Order.

Compensation for injury to dignity, feelings and self-respect

[198] Section 45.2(1).1 of the *Code* provides the authority for the Tribunal to award monetary compensation to an applicant whose rights under the *Code* have been found to have been violated. This provision states:

> 45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

[199] The guiding principles governing an award of compensation for injury to dignity, feelings and self-respect were set out in this Tribunal's decision in *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, where it is stated (at paras. 52 to 54):

> The Tribunal's jurisprudence over the two years since the new damages provision took effect 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: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 at para. 16.
>
> 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. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 at paras. 34-38.

[200] The considerations identified in the *Sanford v. Koop* decision, above, as being relevant to the applicant's particular experience in response to the discrimination are (at para. 34):

- Humiliation experienced by the complainant
- Hurt feelings experienced by the complainant
- A complainant's loss of self-respect
- A complainant's loss of dignity
- A complainant's loss of self-esteem
- A complainant's loss of confidence
- The experience of victimization
- Vulnerability of the complainant
- The seriousness, frequency and duration of the offensive treatment

[201] The Divisional Court in *ADGA Group Consultants Inc. v. Lane*, 91 OR (3d) 649, also has recognized this Tribunal's power to award compensation for the intrinsic value of the infringement of rights under the *Code* as compensation for the loss of the right to be free from discrimination and the experience of victimization. The Court states that, among the factors that this Tribunal should consider when awarding such compensation 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: see paras. 149 and 154.

[202] I also have borne in mind that it is well established that the Tribunal's remedial powers are not punitive in nature: *McCreary v. 407994 Ontario*, 2010 HRTO 2369. The purpose of considering the objective seriousness of the respondent's conduct is not to impose a punitive sanction on the respondent, but rather to consider objective seriousness as a factor in determining the appropriate compensatory award to be made to an applicant.

[203] In *Baylis-Flannery v. DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28, this Tribunal made a cumulative award of $45,000 to a complainant as compensation for her humiliation and loss of dignity and for mental anguish, as a result of the racial and sexual discrimination, sexual solicitations and harassment, racial harassment and reprisal that she was found to have experienced. In this case, the female complainant was found to have been subjected to ongoing sexual solicitation, racial harassment and sexual harassment in the workplace, of both a verbal and physical nature, that included unwanted touching, rubbing, kissing, straddling, leaning in too closely, common assault, and unwanted displays of pornography.

[204] In *Farris v. Staubach Ontario Inc.*, 2011 HRTO 979 and 2012 HRTO 1826, this Tribunal made an award of $30,000 as compensation for injury to the complainant's dignity, feelings and self-respect on the basis: that the complainant had been exposed to a sexually poisoned work environment due to disparaging comments by co-workers and the perpetuation of a sexual rumour about her; that the respondents failed to take appropriate steps to address the poisoned work environment; and that the poisoned environment was a factor in the decision to terminate her employment.

[205] In *M.K. v. […] Ontario*, above, this Tribunal awarded $40,000 to a female applicant as compensation for injury to her feelings, dignity and self-respect as a result of the respondent owner's conduct in paying unwelcome attention to the applicant, writing letters telling her that he loved her and wanted to have sex with her, touching her in a sexual way by pressing his body against her and touching her legs, breasts and buttocks, following her into the bathroom and touching her breasts and trying to insert his fingers into her vagina, and exposing his penis to her while masturbating.

[206] In *S.H. v. M[…] Painting*, 2009 HRTO 595, this Tribunal awarded a female applicant $40,000 as compensation for injury to dignity, feelings and self-respect as a result of the respondent explicitly making comments of a sexual nature when working with the applicant, using explicit and graphic language to describe her genitals and other body parts, making comments about her sexual preferences and practices, brushing up against her, snapping her bra strap, running his hand along her inner thigh

and putting his hand across her chest while driving, and ultimately assaulting her by slamming her up against a van and pinning her and proceeding to kiss and bite her, rub his crotch against her, undo her bra and attempt to undo her pants.

[207] In *Smith v. Menzies Chrysler*, 2009 HRTO 1936, this Tribunal made a cumulative award of $50,000 to a male complainant as compensation for injury to his dignity, feelings and self-respect due to sexual harassment, a sexually poisoned work environment, the company's failure to address the poisoned environment, and reprisal in terminating the complainant's employment. In this case, the complainant experienced conduct including: a co-worker removing his pants in the complainant's presence so that he was naked from the waist down and taunting him by thrusting and gyrating his hips; this same co-worker exposing his penis to the complainant and asking him to "fluff it up" by sucking it; co-workers regularly watching loud pornography in the complainant's presence in the workplace, including a cellphone video of a woman performing fellatio on one of the respondents; and a co-worker leaving a beer bottle filled with urine on the complainant's desk as a "gift".

[208] In *C.U. v. Blencowe*, above, this Tribunal made an award of $30,000 to a female applicant as compensation for injury to dignity, feelings and self-respect on the basis of repeated sexual comments made to the applicant by the respondent, repeated texting of images and messages to the applicant including one of his erect penis, repeatedly exposing himself to the applicant at work, and ultimately waving his penis side to side as he said goodbye.

[209] In *Birchall v. Andres*, 2013 HRTO 1469, this Tribunal made an award of $30,000 to a female applicant as compensation for injury to dignity, feelings and self-respect on the basis of unwanted kissing and hugging by the respondent, brushing his fingers across her breast, and an incident where the respondent kissed the applicant while holding her neck, kissed her chest and tried to force his tongue in her mouth.

[210] In *Smith v. The Rover's Rest*, above, this Tribunal made an award to a female applicant of $35,000 as compensation for injury to dignity, feelings and self-respect on

the basis of the respondent making sexual comments to the applicant, touching her buttocks, making sexual advances toward her, and ultimately terminating her employment for refusing his sexual advances.

[211] In *Iu v. Markham Marble*, 2012 HRTO 65, this Tribunal made an award of $20,000 to a female applicant as compensation for injury to feelings, dignity and self-respect for making sexual advances to her, touching her buttocks on one occasion, and on another occasion standing in front of her desk with his fly unzipped.

[212] In *Chard v. Newton*, 2007 HRTO 36, this Tribunal made a cumulative award of $16,000 to a female applicant as compensation for injury to dignity and mental anguish on the basis of sexual jokes and comments made by the respondent and one incident where he touched the applicant's buttocks and another incident where he touched her breast.

[213] In *C.K. v. H.S.*, 2014 HRTO 1652, this Tribunal awarded $45,000 to a female applicant as compensation for injury to dignity, feelings and self-respect on the basis of the respondent touching the applicant's rib and thigh in a sexual manner, leading up to a sexual assault during which he exposed his penis to her, used force to make her touch his penis, touched her breast, tried to pull her pants down, and then ejaculated onto her pants.

[214] In *J.D. v. The Ultimate Cut Unisex*, 2014 HRTO 956, this Tribunal awarded each of two applicants the amount of $40,000 as compensation for injury to dignity, feelings and self-respect. For one of the applicants, this was based upon the respondent's sexual comments and advances, touching her shoulders, back and leg and slapping her buttocks, asking her to sleep with a friend of his, and offering her lotion as a gift and saying that he wanted to spread it on her body. For the other applicant, this was based on the respondent rubbing her upper thigh close to her vagina, asking about how her boyfriend touched her, offering her gifts, and ultimately hugging her and pulling her onto his lap.

Award of compensation to O.P.T.

[215] With regard to the objective seriousness of the personal respondent's conduct towards O.P.T., it is my view that the seriousness of this conduct is unprecedented in terms of this Tribunal's previous decisions. While there are previous cases in which a respondent has made unwanted sexual solicitations and advances toward an applicant, has touched an applicant's thighs and breasts, has forcibly hugged and kissed an applicant, and even one case where a respondent forced an applicant to touch his penis, the personal respondent's conduct towards O.P.T. in the instant case went far beyond that. In this case, I have found that when alone in the house in Leamington with O.P.T., the personal respondent abused his position of power and authority over her to require her to perform fellatio on him on three occasions and to penetrate her with his penis on another three occasions. O.P.T. felt compelled to comply with the personal respondent's demands on the basis of his threats to send her back to Mexico, when she needed her job in Canada in order to help support her two children. In my view, the unprecedented nature of the personal respondent's conduct in this case justifies a very significant award of compensation for injury to dignity, feelings and self-respect.

[216] A very significant award of compensation for injury to dignity, feelings and self-respect also is justified, in my view, on the basis of O.P.T.'s particular vulnerability as a migrant worker, as part of the analysis of the impact of the respondents' conduct on the applicant referenced in *Arunachalam*, above. O.P.T. was 30 years old when she came to Canada. Her husband had been tragically killed, and she was left to support her two children. As a temporary foreign worker in Canada, O.P.T. was put in the position of being totally reliant upon her employer. As Dr. Preibisch testified, temporary foreign worker programs in Canada operate on the basis of closed work permits, which only entitle a migrant worker to employment with one designated employer. While theoretically possible to transfer employment to another employer while in Canada, there are significant barriers that make this practically impossible or at least very difficult. As a result, a migrant worker like O.P.T. tends to be reliant upon the employment relationship with the designated employer to a degree that is not experienced by Canadian workers. Migrant workers like O.P.T. live under the ever-

present threat of having their designated employer decide to end the employment relationship, for which they require no reason and for which there is no appeal or review, and being "repatriated" to their home country and thereby losing the significant economic and financial advantages of their Canadian employment upon which they and their families depend. In O.P.T.'s case, the personal respondent was repeatedly explicit about this threat to send her back to Mexico if she did not comply with his demands and had demonstrated that he was capable of doing so by repatriating other Mexican women.

[217] O.P.T. was very emotional and often tearful in her evidence before me, and I needed to stop the hearing on a number of occasions while O.P.T. left the room to compose herself during the course of her testimony. O.P.T. testified about how much the personal respondent's actions had hurt her as a woman and as a person, and described how her chest still hurts when she talks about what he did to her. She also described the tremendous shame that she continues to experience as a result of the personal respondent's actions, and the impact this has had on her relationship with her current husband. I also have taken into account the fact that I have found the ultimate incident that led to the ending of O.P.T.'s employment with Presteve was an act of gender discrimination following a pattern of repeated and unwanted sexual solicitations and advances, such that O.P.T. properly can be regarded as having suffered the loss of her employment as a consequence of the repeated violations of her rights under the *Code*.

[218] In my view, the amount of compensation for injury to dignity, feelings and self-respect requested on behalf of this applicant is not unreasonable and is justified, given the unprecedented seriousness of the personal respondent's conduct in this case, the particular vulnerability of O.P.T. as a migrant worker, and O.P.T.'s personal circumstances and the impact of the conduct on her. Accordingly, in my view, an award of compensation for injury to dignity, feelings and self-respect in the amount of $150,000 as requested on behalf of O.P.T. is appropriate.

[219] To put this award in the context of this Tribunal's other decisions, in *Smith v. Menzies Chrysler*, above, the male applicant was awarded $50,000 in circumstances where the applicant was not subjected to sexual touching, let alone any sexual assault and was not nearly as vulnerable as O.P.T. In *C.K. v. H.S.*, above, an award of $45,000 was made where there was one serious incident of forced sexual contact, whereas in the instant case, O.P.T. was compelled to perform fellatio on the personal respondent three times and be sexually penetrated by him three additional times, for a total of six occasions. In *S.H. v. M[…] Painting*, above, an award of $40,000 was made where there was one serious incident of forced sexual contact, which did not include forced fellatio or penetration. In my view, the award of $150,000 sought on behalf of O.P.T. is proportionate to these other Tribunal awards, and reflects the far greater seriousness of what the personal respondent did to O.P.T. than the circumstances in these other Tribunal cases and O.P.T.'s greater vulnerability as a female migrant worker and the impact on her.

Award of compensation to M.P.T.

[220] In my view, the cases most analogous to what M.P.T. experienced are *Baylis-Flannery v. DeWilde* ($45,000), *Smith v. The Rover's Rest* ($35,000), and *J.D. v. The Ultimate Cut Unisex* ($40,000), given that in all of these cases, the female applicant experienced unwanted sexual advances and comments, and sexualized touching of breasts, thighs or buttocks. Given the number of incidents that I have found M.P.T. was required to endure, I find that the personal respondent's conduct in this case is more serious than the conduct in *Iu v. Markham Marble* ($20,000) and *Chard v. Newton* ($16,000).

[221] As with O.P.T., it is my view that it is appropriate for me to consider M.P.T.'s particular vulnerability as a migrant worker when making this award as part of the analysis of the impact of the respondents' conduct on the applicant referenced in *Arunachalam,* above. This factor, in my view, mitigates in favour of an increased award for M.P.T. over and above what has been awarded in previous cases where the conduct at issue was of similar objective seriousness. M.P.T. was only 22 years old when she

first arrived in Canada to work for Presteve. While she did not have children at that time, M.P.T. nonetheless dreamed of building a better life for herself as a result of her work in Canada. She described this as being her goal and aspiration. As a result of the nature of the temporary foreign worker programs in Canada, M.P.T. worked under the ever-present threat of being sent back to Mexico if she did not do what she was told, which was made explicit to her by the personal respondent and which ultimately was acted upon by him in a discriminatory manner. Due to the power and authority that the personal respondent wielded over her, M.P.T. was required to endure the personal respondent's repeated invitations for her to have sex with him and his sexual touching of her thighs, breasts and buttocks. M.P.T. testified about the shame, humiliation and anger that she felt when the personal respondent did this to her. Ultimately, I have found that M.P.T. lost her employment with Presteve and was repatriated to Mexico as a result of an act of gender discrimination in violation of the *Code*.

[222] In my view, in light of the objective seriousness of the personal respondent's conduct towards M.P.T. in the context of this Tribunal's decided cases, the particular vulnerability of M.P.T. as a migrant worker, and the impact of this conduct on her, I find that an award of $50,000 as compensation for injury to dignity, feelings and self-respect is appropriate.

Interest

[223] This Tribunal has the power to award interest on awards of compensation for injury to dignity, feelings and self-respect, which sometimes are referred to as general damages: see *Impact Interiors Inc. v. Ontario (Human Rights Commission)* (1998), 35 C.H.R.R. D/477 (Ont.C.A.); *Ontario (Human Rights commission) v. Shelter Corp.*, [2001] O.J. No. 297 (Div.Ct.).

[224] Pre-judgment interest is typically awarded on the basis of the pre-judgment interest rate established pursuant to section 127 of the *Courts of Justice Act*. While the pre-judgment interest rate is typically based upon the interest rate from the quarter in which the proceeding was commenced (which in this case would be the third quarter of

2009), I have the discretion to award O.P.T. and M.P.T. a different interest rate where appropriate: see *SPPA,* s. 17(2). Here, the pre-judgment interest rate for the third quarter of 2009 (0.5%) is artificially low in relation to the rates from 2011 to 2014, which were 1.3%. In my view, it is appropriate to award O.P.T. and M.P.T. 1.3% as the appropriate rate for pre-judgment interest.

[225] I find that pre-judgment interest should run from the last incident of discrimination that I have found, which for O.P.T. would be in late August or early September 2008 and for M.P.T. would be April 2, 2008. This results in an award of pre-judgment interest to O.P.T. in the amount of $14,956.50 and for M.P.T. in the amount of $4,658.33.

[226] Post-judgment interest shall run on any amount of the award that remains unpaid more than 30 days after the date of this Decision at a rate of 2.0% calculated from the date of this Decision.

Public interest remedies

[227] Pursuant to s. 45.2(1).3 of the *Code*, I have the power to make an order directing any party to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with the *Code*. Pursuant to s. 45.2(2) of the *Code*, this power extends to future practices and may be exercised even if no order under s. 45.2(1).3 was requested. These remedies are sometimes referred to as public interest remedies.

[228] The applicants have requested an order requiring Presteve to provide any workers hired under the auspices of the temporary foreign workers program with human rights information and training in the native language of any such hire. Given the circumstances before me, where all three applicants who testified before me gave evidence that they were not informed about their rights under the *Code* and so were unaware of their rights, it is my view that this is an appropriate order to make. In this regard, I note that the Ontario Human Rights Commission provides a free e-learning module on its website called “Human Rights 101” which is available in multiple languages, including Spanish among many others. If the necessary language is not

available through the Commission's website, then the corporate respondent shall provide a translated version of this information and training at its own cost. This order shall apply to the corporate respondent for a period of three years.

[229] Finally, I was invited by the intervenor to make comment upon certain aspects of temporary foreign worker programs in Canada. As these programs fall within federal jurisdiction, it would not be appropriate for me to do so. Further, with regard to any provincial initiatives that may be recommended by Dr. Preibisch, I note that the province is not a party to this proceeding. I have commented in this Decision and in my decision in *Peart v. Ontario (Attorney General)*, above, regarding the particular and special vulnerabilities of migrant workers in Ontario, especially in light of the closed work permit that requires them to be tied to one employer and so be under the constant threat and fear of losing their employment and being repatriated without reason and without any avenue for appeal or review. Dr. Preibisch testified that, in her opinion, it may be helpful to institute a registry for companies who employ migrant workers, such as the one that exists in Manitoba, and to take other steps identified by her to address the vulnerabilities of migrant workers. However, I do not have jurisdiction in this proceeding to make any such order. As a result, the intervenor's request is denied.

ORDER

[230] For all of the foregoing reasons, I make the following findings and orders:

a. I find that the personal respondent made unwanted sexual solicitations and advances toward O.P.T. in violation of s. 7(3)(a) of the *Code*, engaged in sexual harassment towards O.P.T. in violation of s. 7(2) of the *Code*, and created a poisoned work environment and discriminated against her in respect of employment because of sex contrary to s. 5(1) of the *Code*;

b. I further find that the personal respondent made unwanted sexual solicitations and advances toward M.P.T. in violation of s. 7(3)(a) of the *Code*, engaged in sexual harassment towards M.P.T. in violation of s. 7(2) of the *Code*, and also created a poisoned work environment and discriminated against her in respect of employment because of sex contrary to s. 5(1) of the *Code*;

c. I further find that Presteve Foods Ltd. is jointly and severally liable with the personal respondent for these violations of the *Code*;

d. I order the personal respondent and Presteve Foods Ltd., jointly and severally, to pay to O.P.T. the amount of $150,000.00 as compensation for injury to her dignity, feelings and self-respect, plus pre-judgment interest in the amount of $14,956.50;

e. I order the personal respondent and Presteve Foods Ltd., jointly and severally, to pay to M.P.T. the amount of $50,000.00 as compensation for injury to her dignity, feelings and self-respect, plus pre-judgment interest in the amount of $4,658.33;

f. I further order post-judgment interest on any of the foregoing amounts that remain unpaid more than 30 days after the date of this Decision at a rate of 2.0% calculated from the date of this Decision; and

g. I order Presteve Foods Ltd. to provide any workers hired under the auspices of the temporary foreign workers program with human rights information and training in the native language of any such hire for a period of three years from the date of this Decision.

Dated at Toronto, this 22nd day of May, 2015.

"Signed by"

_____

Mark Hart
Vice-chair